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# LAW MAGAZINE AND REVIEW.

No. CCCLXVII.—FEBRUARY, 1913.

## I.—THE LEGISLATIVE CONTROL OF THE SALE OF POTENT DRUGS.

THE appointment of a Parliamentary Committee to inquire into the whole subject of the sale and advertising of "patent medicines," as well as the number of fatalities which have occurred of recent years through the injudicious or deliberate use of certain powerful drugs, particularly soporifics, whereby at the inquest either the coroner, jury or a doctor, had occasion to deplore the facility with which such preparations could be obtained, render it a matter of some interest at the present moment to compare the legislative safeguards provided in Great Britain with those of other countries for preventing indiscriminate self-drugging. In this respect the conditions prevailing in the United Kingdom differ materially from those in existence in Continental countries, the fundamental difference lying in the fact that, whereas the British Poisons and Pharmacy Act merely prescribes the observance of certain formalities on the part of a pharmacist selling a scheduled poison, and does not otherwise restrict their sale in any way, on the Continent, on the contrary, the sale of quite a large number of remedial agents, many of which may be sold in Great Britain by any shopkeeper, are only delivered by the chemist on the production of a qualified

medical man's prescription. Thus, acetanilide and phenacetin, two favourite components of "headache powders," may be sold in Great Britain by any tradesman, whereas in a number of Continental countries the pharmacist is permitted to supply either preparation only on the production of a prescription.

The British Poisons and Pharmacy Act, 1908, makes no distinction between the sale for technical and for medicinal purposes of the poisons enumerated in its two schedules, and the monopoly formerly enjoyed by the qualified pharmacist of being the sole legal purveyor of scheduled poisons to the public, a duty for which he is eminently qualified by his training, has been seriously undermined by the provision contained in the new Act, empowering local authorities to license persons other than pharmacists to sell poisonous substances used exclusively in agriculture or horticulture as insecticides, &c.

The formalities to be observed when selling a poison in Great Britain may be summarised as follows:—In the case of a substance contained in Part I, which includes arsenic, the poisonous alkaloids, corrosive sublimate, cyanide of potassium, &c., the purchaser must be known to the seller or must be introduced by some person known to the latter. An entry of the sale has to be made by the pharmacist in his poison book, giving the date of the sale, name and address of the purchaser, name and quantity of the poison sold, and purpose for which it is required. The purchaser has then to sign the poison book. The poison itself must be labelled with the name of the article, the word "poison," the name and address of the seller.

In the case of a poison contained in Part II, the procedure is considerably more simple, and it might be said that the only restriction attached to the sale of these substances consists in prohibiting their sale by any person other than a qualified pharmacist. The only formality attached is the

requirement of labelling the article with its name, the word "poison," and the name and address of the seller. This list includes, *inter alia*, such potent drugs as chloral hydrate, digitalis, sulphonal, and all preparations containing less than one per cent. of morphine. In most Continental countries none of these preparations may be supplied except upon a prescription; in Great Britain, on the other hand, their sale is not restricted by a similar safeguard, and the public is at liberty to indulge in the use of a powerful drug, capable of doing considerable harm if injudiciously employed, or of satisfying the craving for a certain preparation without the advice and sanction of a doctor. It is particularly in the case of mixtures sold under special names, as in the case of "patent medicines," that the absence of any legal restrictions regarding the sale of more or less potent drugs, or of drugs which through prolonged use may prove injurious to the system, may lead to disastrous results. For in the case of a mixture containing a poison enumerated in Part II of the Act, it is not necessary to disclose the nature of the substance present; as long as the label bears the word "poison" and the name and address of the seller—which in this case must be a qualified pharmacist—the legal requirements have been satisfied, and the responsibility of the pharmacist ceases. This refers merely to those substances which are included in the poison schedules, and yet there are in common use quite a large number of potent drugs which do not come within the meaning of the Act, and which may even be sold by any tradesman however ignorant of their properties. In the medical evidence given before the Parliamentary Committee on Patent Medicines the lack of control over the sale of such powerful or habit-forming drugs was specially emphasised.

Turning to a consideration of the conditions abroad, we find that, in the first place, a strict distinction is made between the sale of poisons for technical and for medicinal

purposes. The sale of poisons for industrial uses is usually made the object of special legislation, which extends not only to the formalities to be complied with by the purchaser, usually taking the form of obtaining a permit from the local authorities prior to each purchase, but also prescri manner in which the poisons are to be stored and by the seller; in some cases the use of special utensils marked with the name of the poison have to be employed for weighing or mixing, and minute instructions regarding the storage of certain substances are not omitted.

As regards the sale of poisons for medicinal purposes, we strike a fundamental difference between our conditions and those prevailing in Continental countries. In most of the latter the pharmacist is the sole legal purveyor to the public of all medicines in whatever form, and, with the exception of a few Swiss cantons, doctors are forbidden to dispense their own medicines. In this way the sale of remedial agents is easily controlled, and it is the pharmacist who is entrusted with the task of seeing that the public does not indulge in indiscriminate self-drugging in any form.

In Germany the Government has drawn up a list of substances none of which may be sold except upon the production of a qualified medical man's prescription, or of a prescription written by a qualified dental surgeon or veterinary surgeon (only in the case of drugs for animals). This list naturally includes all the powerful poisons, but in addition it contains a large number of drugs the sale of which in Great Britain is not hampered by any restrictions whatever. Among these figure, to quote but a few examples:—

> Acetanilide, Amyl Nitrite, Antipyrine, Caffeine and its Salts, Extract of Male Fern, Chloral Hydrate Migraenin, Paraldehyde, Phenacetin, Jalap Resin, phonal, Tartar Emetic, Sodium Salicylate, Tincture of Opium, Trional, Veronal, Ipecacuanha Wine, and Zinc Sulphate.

Nor is the scope of this list exhausted with the sole enumeration of drugs which may not be sold except on a prescription—it also serves to regulate the vexed question of repeating prescriptions. British doctors frequently voice the complaint that their patients continue having a prescription made up without their knowledge when other conditions have supervened, or that their prescriptions are lent to friends suffering apparently from the same symptoms as the patient who benefited at the time by the medicine prescribed. There are no regulations in England regarding the repeating of prescriptions, but this is automatically solved by the above-mentioned list as far as Germany is concerned. Against each drug on the list is also stated the maximum single dose which will permit a prescription calling for that preparation as an ingredient to be repeated without formality. If the single dose exceeds the amount stated, then the patient must each time obtain the signature, with the date, of a doctor (or dental surgeon, or veterinarian, according to the case) before the pharmacist is permitted to make up the medicine again. For instance, a prescription containing any of the following drugs may be repeated without formality (unless it bears a remark to the contrary by the prescriber) if the single dose does not exceed the amount stated against each:—

| | | |
|---|---|---|
| Acetanilide | grains | 7½ |
| Antipyrine | „ | 15 |
| Arsenic | grain | 1/12 |
| Extract of Belladonna | „ | ¾ |
| Opium | grains | 2 |
| Phenacetin | „ | 15 |
| Tincture of Nux Vomica | „ | 15 |
| Tincture of Opium | „ | 24 |

If the single dose is not apparent from the directions on the prescription, the pharmacist is not permitted to

dispense the medicine without first obtaining the doctor's consent in writing. Nor is this all. The German pharmacist is forbidden to repeat a prescription containing any of the following ingredients unless it bears on each occasion the renewed signature, and date, of a doctor:—Chloral Hydrate, Chloral Formamide, Morphine, Heroin, Cocaine or their salts, preparations of Ethylene, Amylene Hydrate, Paraldehyde, Sulphonal, Trional, Urethane or Veronal. It will be observed that this prohibition includes all the well-known habit-forming drugs, the unchecked use of which is thus effectively prevented.

In Austria the list of preparations which may not be sold without a prescription is included in the official pharmacopœia. This country goes even further than Germany, as it also includes, *inter alia*, that useful and very popular purgative, aloes and extract of aloes, in addition to bismuth subsalicylate and subgallate, formaldehyde and iodoform. Hungary goes a step further and forbids the sale without a prescription of ammonium and potassium bromide, sodium and potassium iodide, and does not permit copies of prescriptions calling for a preparation enumerated in the list to be dispensed unless signed by the doctor.

The Russian restrictions correspond in the main with those in force in Germany, as it is forbidden to sell any preparation which, according to the instructions contained in the pharmacopœia, must be kept under lock and key or apart from other products and marked in a distinctive manner. It must also be remembered that when the Russian Medical Board grants permission for a foreign product to be introduced, it also decides whether it may be sold only upon production of a prescription, or without this restriction.

In the foregoing, a brief *résumé* has been given of the restrictions which surround the sale of certain potent drugs on the Continent, and it is apparent that the legislation on

this subject is considerably stricter than is the case at home. The object of the legislator has been to prevent, as far as it is possible in dealing with human beings who often wilfully disregard measures enacted for their benefit, a person from acquiring through ignorance a habit for a certain drug, or from indulging indiscriminately in the use of potent remedies which may have disastrous effects on the health of the individual if not taken with proper precautions. It now remains to be seen what effect these restrictions have on the sale of compounded medicines placed on the market ready for use, and recommended by their manufacturers for the treatment or cure of certain diseases and afflictions to which flesh is heir.

As already mentioned, the German pharmacist is responsible for the proper application of the laws regarding the sale of medicines, therefore in the case of a patent medicine he must assure himself that it does not contain any drug included in the list of preparations which may not be sold without a prescription. For this reason, no preparation placed on the market containing even a small amount of opium, calomel, or chloroform, to give but a few examples, may be sold except the purchaser is able to produce a qualified medical man's prescription.

As regards the sale of patent medicines not containing potent drugs, it is generally acknowledged in Germany that the existing laws are far from satisfactory. There are numerous regulations in force of a more or less local character, enacted by the governments of the different States, or by the police authorities, designed to repress this "evil." Recognising that advertisement is the foundation of the sale of such preparations, most of these enactments are directed against the advertisements of preparations classed as "secret remedies"; in some cases the publishers of newspapers are warned against accepting such advertisements, or the exact formula of the preparation has to be

disclosed. An attempt has been made to regulate the subject on a uniform basis throughout the whole of the Empire by means of a decree issued by the Federal Council in 1907. A list of 153 patent medicines was drawn up, 30 of which may only be sold upon a prescription, regardless of the fact that they may contain quite innocuous constituents. In the case of all of these preparations it is forbidden to print on the label of the container or to distribute in any way any printed matter containing recommendations, testimonials, or expressions of thanks from persons supposed to have been cured by the use of the remedy, as well as any statements ascribing a healing or prophylactic action to the preparation. Further, it is forbidden to publicly advertise the preparations enumerated in this list in any manner whatsoever. British and American patent medicines are also represented in this list—*e.g.*, Beecham's Pills, Elliman's Universal Embrocation (but not the embrocation for horses), Mother Seigel's Syrup and Pills, Blair's Gout and Rheumatic Pills, and Pink Pills.

The Imperial Government introduced in the Reichstag a few years ago a Bill dealing with the whole subject of quackery and the sale of patent medicines, but it was withdrawn before the discussion in Committee was brought to a conclusion. One of the provisions of this Bill included the creation of a central body, to be attached to the Federal Council, and which would be empowered with the duty of sanctioning the sale to the public of all preparations. This was to be the supreme instance against whose decision there would be no appeal, and extremely heavy penalties, including imprisonment in addition to fines, were provided for persons selling "secret remedies" the sale of which had been forbidden, as well as for publishers who infringed any of the rules regarding the advertising of such products.

It may be of interest to mention in connection with the above that the health authorities of several of the larger German towns have for years actively co-operated with the authorities in trying to suppress one of the worse features of modern enterprise. As soon as it is found that the manufacturer of a certain nostrum is bringing his preparation to the notice of the people in the town, an official "warning" is published in the daily newspapers. This takes the form of a communication disclosing the exact composition of the remedy, its cost and the real therapeutic effect of the ingredients, with a few general words of advice suitable to the case. In this way it is sought to enlighten the public about the true nature and value of the nostrums that are being brought to their notice by unscrupulous persons.

As regards the sale of "patent medicines" in some other countries, it is interesting to note that even the Great Republic has found it necessary to legislate in the interests of the health and pockets of her citizens and safeguard both against the effects likely to follow from over great confidence in the specifications of the advertisement writer with a boundless imagination in the matter of therapeutic properties. In the United States, according to the Food and Drug Act of 1907, compounded preparations containing alcohol, opium, morphine, cocaine, acetanilide, chloral hydrate or chloroform, *inter alia,* must bear on the label a statement of the quantity or proportion of any of these drugs therein contained. If the label bears any false or misleading statements regarding the preparation or its ingredients, the article is deemed to be misbranded, and the maximum penalty provided for transgressions against this Act is a fine of five hundred dollars, or one year's imprisonment, or both. It is significant to note that shortly after the passage of this Act the statements printed on the labels of several American patent medicines were considerably mitigated—for instance, instead of the word "cure" the

expression "remedy" was substituted. In this connection it is worth noting that in the case of American nostrums exploited in this country the printed matter distributed in Great Britain contains all the extravagant claims which passed unchallenged before the passage of the Act in question—a subtle acknowledgment of the absence in our Isles of a law compelling the label "to tell the truth" in the case of patent medicines.

In Austria and in Russia, before any compounded preparation may be placed on the market, permission must first be obtained from the Board of Health, and the manufacturer is compelled to give full particulars regarding the mode of preparation cost, &c., of his product. These statements are verified in the Government laboratory, whereupon permission is granted, or refused, to market the article, with a statement to the effect that it is either to be sold only upon the production of a qualified practitioner's prescription, or that it may be sold without this restriction. Foreign firms wishing to place their medicines on the Austrian market must be legally represented by a qualified Austrian pharmacist in business in that country, who has to bear full responsibility personally in case of irregularities in the sale of the preparation being brought to the notice of the authorities.

It is certainly one of the foremost duties of the State to safeguard the health of the citizen by taking the necessary steps to prevent unscrupulous individuals from trading upon his infirmities, real or imagined, and also to protect him from himself by placing certain wise restrictions on the sale of such drugs as are likely to prove injurious to health if injudiciously employed. Foreign countries have gone considerably farther than Great Britain in this respect, and it is particularly significant to note that one of the last to find it imperative in the interests of its citizens to follow suit and impose restrictions on the sale of certain habit-forming

and potent drugs is the United States, one branch of the Anglo-Saxon race which enjoys the distinction of being excessively prone to indulge in medicine. The matter is at present *sub judice*, and the recommendations of the Parliamentary Committee on Patent Medicines may be awaited with considerable interest. The National Insurance Act, by compelling doctors to prescribe instead of dispensing themselves the medicines to insured persons, will restore to the British pharmacist his birthright, and will in future greatly facilitate the practical application of any health laws he may be called upon to give effect to, as is at present the duty of his *confrères* in Continental countries.

GEORGE P. FORRESTER.

## II.—THE SUPERSESSION OF THE LAW COURTS BY BUREAUCRACY.

IT is proposed, in the following pages, to examine the trend of recent legislation in conferring powers upon Government departments to be judges in their own cause in controversies which arise as to their powers and the powers of their officials as against the general public. The present generation is accustomed to look for authoritative statements on questions of law and politics to Professor Dicey, and this article may fitly begin with a quotation from his best-known work:—

"We mean, in the second place, when we speak of the 'rule of law' as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

"Anyone who considers with care the nature of the *droit administratif* of France will soon discover that it rests on two

leading conceptions alien to the conceptions of modern Englishmen. . . . The second of these general ideas (the *séparation des pouvoirs*) means, that while the ordinary judges ought to be independent of the executive, the Government and its officials ought (whilst acting officially) to be independent of, and to a great extent free from, the jurisdiction of the ordinary Courts.

"According to French notions, the ordinary judicial tribunals which determine ordinary questions, whether they be civil or criminal, between man and man, must, speaking generally, have no concern whatever with matters at issue between a private person and the State, but such questions, in so far as they form at all matter of litigation, must be determined by administrative Courts in some way connected with the Government or the administration."

These extracts from Professor Dicey's well-known *Law of the Constitution* put in a clear and crystallized form a principle which is so ingrained in English thought as to be scarcely prized as it deserves. We are no more conscious of it than we are conscious of the air or of sunlight. We do not realise what its destruction would mean. It is the principle of the Rule of Law:—that English relations are governed by the judgment of calm, cool impartiality as embodied in a supreme Judicial Bench: that the plainest citizen has a claim to that settled protection, as against the most flamboyant earthly providence. It may not be an ideal Rule:—but without it England would not be England.

We are proceeding, with some rapidity, to dispense with it. I am not concerned here to deal with the blow to the Rule of Law which was dealt by the Parliament Act; nor with the disastrous results of pushing to extremes the doctrine of Parliamentary omnipotence. It is plain that the permanence and stability which are the essence of Law are not to be found in the arbitrary decrees of a party majority, prohibited even from free discussion. They are not Law, and do not deserve the name. As Alberdi says: "Party decrees are not laws made by the people for the

people—they are the dictates of *half* the people, and deserve only *half* the people's obedience." The Parliament Act, by releasing the Ministry from the necessity of compromise—the ruthless application to fundamental issues of the dubious doctrine of the omnipotence of Parliament—these are indeed rough shocks to the Rule of settled Law. But my present purpose is a humbler one than to elaborate these points. It is to insist on a simple practical detail—that, whatever Acts be passed, the duty of applying and interpreting them shall be the function, not of interested State departments, but of dispassionate Courts of Justice.

I have said we are, not without rapidity, losing this safeguard. It is a real one. The Crown in Parliament makes the Statute, but the Judge on the bench interprets it. And he regards it as his duty to give it a just interpretation. Language can mean anything. It is well known that "a coach and four can be driven" through any Act of Parliament. Where the coach and four can drive, the Judge's carriage can. It is the power which the Courts have of interpreting *all* statutes, which secures the supremacy of the rule of law. An Act is only law in the sense which a bench of Judges will find themselves capable of putting upon it. It is not open to the free construction of a friendly Government. In the celebrated *Swansea Case*,[1] in which the Board of Education had disregarded the report of its own Commissioner (now Lord Justice Hamilton), the action of the Department was justified by the plain and strong words of the Act, providing that disputes should be referred to the decision of the Board, and implicitly, that its decision should be final. The Supreme Court held that its "final" decision was vitiated by the wrong principles on which it acted in giving it! To take a perfectly non-political instance, the sweeping provisions of Chamberlain's Bankruptcy Act—(quite probably intentional)—have been sub-

[1] *R.* v. *Board of Education* (L. R. [1910], 2 K. B. 165).

verted by the desire of the Bench to be fair and to do justice. The judges have read "void" to mean "voidable"—and have thus preserved the rights of an innocent transferee from the grasp of the Official Receiver through the relation back of the Receiver's title to three months previous to the unsuspected date of an obscure "act of bankruptcy."[1]

Such a power is not lightly to be undervalued. The process of undermining it, by withdrawing matters from the decision of the Courts, is of quite recent growth, and has attracted little public attention. The attack on the Courts has been developed gradually and half unconsciously. Dicey did not fail to observe its first manifestations. But they struck him as trivial and negligible. So perhaps they would have seemed to any Englishman. British liberties would hardly find their Sedan in the concession to a Board of powers to settle technical questions of sewerage. With an instinct fostered by experience, French observers of English institutions whom he quotes,—*e.g.*, Laferrière,—detected in these innocent beginnings the germs of a fatal disease—Bureaucratic degeneration of the heart.

But let us again quote Dicey[2]—

"The powers of the English [? British] Government have, during the last eighty years or so, been largely increased; the State has undertaken many new functions, such, for example, as the regulation of labour under the Factory Acts, and the supervision of public education under the Education Acts. Nor is the importance of this extension of the activity of the Government lessened by the consideration that its powers are in many cases exercised by local bodies, such, *e.g.*, as County Councils. But though the powers conferred on persons or bodies who directly or indirectly represent the State have been greatly increased in many directions, there has been no intentional introduction into the law of England of the essential principles of *droit administratif*.

[1] *In re Hart ex p. Green* [1912], 81 L. J. 1213.

[2] The extract which follows does not appear in earlier editions than the seventh (1908).

Any official who exceeds the authority given him by the law incurs the Common-law responsibility for his wrongful act; he is amenable to the authority of the ordinary Courts, and the ordinary Courts have themselves jurisdiction to determine what is the extent of this legal power, and whether the orders under which he acted were legal and valid."

Dicey lays down this broad proposition, without considering it affected by the apparently few and trivial cases in which Parliament had invested officials with a power of decision. There was no intentional introduction of the principles of *droit administratif.* An official who was alleged to have exceeded his duty remains justiciable by the ordinary Courts.

Can we say the same to-day? To-day, it is becoming the habit, not only in recondite and technical matters, but in affairs which touch the daily life of the people, to invest departments with exclusive power to decide disputes arising out of the Acts which they administer. The Department becomes that judicial monster, a judge in its own cause. It orders one official, called a local authority, to perform an illegal act, and it orders another official, called a first-class clerk, to declare the illegality lawful.

De Tocqueville, treating of the difficulty he had in making his English and American friends comprehend the nature of the *Conseil d'Etat,* said—

"When I told them that the King [under the restored monarchy], after having ordered one of his servants, called a Prefect, to commit an injustice, has the power of commanding another of his servants, called a Councillor of State, to prevent the former from being punished . . . . they refused to credit so flagrant an abuse, and were tempted to accuse me of falsehood or of ignorance. It frequently happened before the Revolution that a parliament issued a warrant against a public officer who had committed an offence, and sometimes these proceedings were stopped by the authority of the Crown, which enforced compliance with its absolute despotic will. It is painful to perceive how much lower

we are sunk than our forefathers—since we allow things to pass under the colour of justice and the sanction of the law, which violence alone could impose upon them."[1]

It is rather curious to see how the insidious system has developed in England.

In 1875 there was passed a lengthy statute, part of the Conservative "policy of sanitation" which has sapped the self-reliance and stamina of the English, called the Public Health Act (38 & 39 Vict., c. 55). Section 268 of that enactment, dealt with drains as follows:—

> "Where any person deems himself aggrieved by the decision of the local authority to recover in a summary manner any expenses incurred by them, or to declare such expenses to be private improvement expenses, he may . . . . address a memorial to the Local Government Board . . . . the Local Government Board may make such order in the matter as to the said Board may seem equitable, and the order so made shall be binding and conclusive on all parties."

It will be seen that this, apparently the first, introduction of the grant of judicial powers to a department, was made in pursuance of the Conservative "policy of sewage." There was nothing far-reaching or startling about it. It merely enabled a particularly expert authority to review the decision on a technical matter of sanitary engineering of a less expert authority.[2] It did, indeed, empower the department to sanction and stimulate local extravagance of requirements. But it was all a matter of pounds, shillings, and pence, concerning fairly well-to-do owners.

It amounted to little more than the assessment of a tax the only requisite in which is impartiality: and this was tolerably well secured by the interposition of the central

[1] *Democracy in America*, Vol. I (transl.), p. 101.

[2] See sects. 23, 36, 46, 62, 150, etc.

[3] In point of fact, the provision seems to have been imitated from Taxing Acts, e.g. Income Tax Act 1842: "If any person shall think himself aggrieved by any assessment made by the said Commissioners . . . . . it shall be lawful for him to appeal to the Commissioners for general purposes."

authority. Only local and personal jealousies could lead to injustice on the part of the local people. No broad questions of conscience, religion, or conduct were raised. The only danger was of extravagance, and no law Court could guard against this.

On this drainage Act we have the advantage of the opinion of Wright, J. It is only a word—but an illuminating one. In 1893 the Local Government Board, acting on the results of their own inquiry, and deciding judicially that that inquiry was an adequate one, made an order that Sunbury should be sewered. Cave, J., on principle, declined to interfere. ("Had he retired in 1891," says the *Dict. of Nat. Biography*, "he would have avoided a certain loss of reputation.") Wright, J., agreed—but solely on the authority of a previous case, *R.* v. *Lincoln*, which is unreported. Otherwise, "I confess," he said, "I should not have come to the same conclusion."[1]

Now this innocent-looking section of the Public Health Act seems the parent and prototype of all the inroads which have been made on the powers of the law Courts since.

It is reproduced almost textually in the Education Act of 1902.

By 1902 the thin end of the wedge had been driven thoroughly home. In that year was passed a statute which virtually placed the children of England under the absolute control of a Department of State. No longer the mere arbiters of the sufficiency of sewers, the bureaucracy confidently assumes the rôle of arbiter of lives. Whether children are to be brought up in one attitude towards life, or in another, was to depend on the nod of someone at the Board of Education. The sufficiency of a school was placed on the same level as the depth of a drain.*

* "If any *question* arises [as to the keeping efficient, &c. of a public elementary school] between the local education authority

[1] *R.* v. *Staines*, 69 L. T. 716.

and the managers of a school not provided by that authority, that question shall be determined by the Board of Education."[1]

These Acts of 1875 and 1902 were the work of Conservative Ministries. The Liberal Minister of a few years later announced his intention of using the administrative powers, with which he had been unwisely clothed, to make difficult the position of voluntary schools; and the Swansea scandal was the result. The local authority deliberately lowered the rates of pay in the voluntary schools: the Department said they were right, and it was only by imputing to that Board ineptitude rather than perversity, and by holding that they really had not decided the dispute at all, that justice was eventually done by the Court of Appeal.

The questions substantially were, whether the sums paid by the local authority to the managers for their teachers were sufficient. But one question (3) specifically raised the question of "discrimination" in favour of the authority's own schools against this voluntary school in the matter of salaries. The Board, in a letter which was rather argumentative than judicial, did not deal with the questions *seriatim*, but stated that salaries allowed by the local authority were adequate:—

> "I have carefully considered the terms of the Board's decision," says Hardy, M.R. "I regret to say that I can only account for it upon the theory that the Board took the view that the local authority might discriminate between "provided" and "non-provided" schools *as such*, and that it was sufficient if the school was so maintained as to earn the Government grant . . . . On any other view it seems to me the decision was so perverse as really to amount to a non-exercise of the jurisdiction entrusted to the Board."

That is, the "decision" was either perverse or no decision at all. The true question put by the managers was: "Are the local authority entitled to discriminate against us?"

[1] 2 Edw. VII, c. 42, s. 7 (3).

The only answer was: "They are paying you plenty!" It will seem to many that this was both evasive and perverse as well.

Incidentally, the case shows in a strong light one grave technical defect inseparable from these tribunals. It is their tendency to confuse the issue, and to avoid clear pronouncements on categorical questions. We know how difficult it is to extract clear information from Circumlocution Offices. Their "legal" decisions are apt to be similarly oracular.

It is obvious that the Courts are anxious to avoid matters being finally determined by Departments. It is equally obvious that there is great difficulty in securing such a result. The Courts can only in very extreme cases say that the department "has not answered the question" or "has answered it altogether perversely." That such cases have arisen is sufficiently alarming. In how many less extreme cases may not the department have had its way beyond possibility of control! The Education Office has, for instance, decided that teachers may be ordered to attend board meetings, and that the liability of the local authority for "fair wear and tear" does not extend to playground lavatories (though the managers are bound to provide a playground !).

The climax comes in the National Insurance Act, 1911, s. 66, in which the powers conferred on the Commissioners include the power of peremptorily determining all questions as to the approval of societies and doctors—the rate of contributions payable by or in respect of the insured (though not as to the mere fact of liability to insurance)—and *every* dispute between an insured person and the local Insurance Committees! Since these questions are not questions of mere taxation, but of the independence of the poorer classes, the powers thus entrusted to bureaucrats are stupendous.

The Courts are on the way to be relegated to a secondary

place. They are contemptuously allowed to deal with matters of mere private concern. Anything like Education or National Insurance, that touches the public interest, is swiftly being withdrawn from them, and placed in departmental hands.

Surely it is time that English people should remind themselves that the Courts, if costly, are the bulwark of liberty, and that there is weight in the Master of the Rolls' words at the Guildhall banquet of November 9th, 1911:[1]

> "There has been a tendency in recent years to remove from the Courts matters which properly belong to them, and to entrust them to Government departments. I venture to think that is a great mistake. What is the meaning or value of a decision arrived at in secret conclave, without argument, without reasons assigned, in a Government office?"

Lord Justice Farwell, Mr. Justice Eve, and Mr. J. G. Butcher, K.C., have expressed themselves in somewhat similar terms.

The British Constitution Association has issued a timely appeal to all who value English traditions of ordered liberty, and particularly to those engaged in the profession of the law, to combine to oppose this vicious if convenient ministerial habit of delivering over the people, bound hand and foot, to the tender mercies of the bureaucracy. Bureaucratic decisions are certain to be biassed and unscientific. The danger is real and imminent that their scope will be extended. Already, since 1905, regular Reports of "Departmental Decisions" have made their appearance, and are treated as "legal interpretations of law."[2] The insertion of clauses conferring such powers on the bureaucracy is becoming common form in Acts of Parliament. Concerted action alone can restore the English privilege of a fair trial before a competent judge.

[1] See *The Times*, November 10th, p. 9.

[2] Rogers, *Departmental Decisions*, London, 1905–12.

In conclusion let us again quote De Tocqueville:—

"The authority of the Government has gradually been introducing itself into the natural sphere of the Courts; and there we have suffered it to remain—as if the confusion of powers was not as dangerous if it came from the side of the Government as if it came from the side of the Court, or even worse. For the intervention of the Courts into the sphere of Government only impedes the management of business, whilst the intervention of Government in the administration of justice depraves men, and makes of them at once both revolutionaries and slaves."[1]

TH. BATY.

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## III.—POLITICS AND THE LAW.[2]

THOSE who are constant readers of the Liberal daily press cannot fail to have noticed, from time to time, bitter attacks upon the legal profession. The attack has taken many forms. Sometimes there has been a definite onslaught on the profession as a "vested interest," and sometimes the attack has appeared in a less noticeable *obiter dictum*, both of which clearly indicate the growing opposition which some politicians feel towards the Law. As an instance of the latter method of attack, I would cite a passage in the leading article of the *Daily News and Leader* of May 29th, 1912. In a discussion of the report of Sir Edward Clarke upon the dock labour disputes occurs the following passage: "The prompt appointment of Sir Edward to inquire into the facts of the dispute was very creditable to the Government, a new departure in the handling of a grave and instant problem; the manner in which Sir Edward conducted the inquiry, in particular his rigorous exclusion of lawyers, was admirable."

[1] De Tocqueville: *L'ancien régime et la révolution.*

[2] This article has been unavoidably held over owing to the exigency of space, —Ed. *L. M. & R.*

I do not propose to discuss the merits of Sir Edward Clarke's decision not to permit the contending parties to appear before him by counsel. I would only draw attention to the cordial approval which this decision received from the leader writer. I quote the preceding passage in order to show the inconsistency of the view taken. The appointment by the Government of a prominent lawyer to report upon the points in issue is hailed with delight; the exclusion of the profession from the exercise of its ordinary work is equally popular. It is obvious, therefore, that lawyers are not necessarily disliked *quâ* lawyers. There is something else which arouses the wrath of the Liberal press.

A more direct attack appeared in the same paper of 19th January, 1912, and I quote the following passage from the leading article. "How much light and leading, how much inspiration or common social service, how much pure intellectual work, comes out of the Inns of Court? The Bar needs something more than dinners and papers if it is not to be condemned off-hand as a parasitic industry. It needs the civic spirit."

On 24th April, 1911, the *Daily News* published a bitter article which included the following: "One would have thought that the public in these democratic days would have insisted by now upon having a voice in the control of the profession which is most nearly connected with the administration of justice." "The opinions of the masses of the people rarely receive fair consideration from the judges." And again, "The confining of the Bar to the middle and upper classes has created that class administration of justice which is felt so strongly among the Trade Unionists and the general body of the working classes."

If these passages were from the pen of a man like H. G. Wells, they would be intelligible. He objects to lawyers generally, and maintains that they should have nothing to

do with the affairs of State. He has denounced a Cabinet in which the Prime Minister, Chancellor of the Exchequer and Minister for War, were lawyers, and this is at least a consistent view. But the Liberal party has never raised any objection to the presence of lawyers in the House of Commons or the Cabinet. Yet these constant attacks upon the profession indicate a growing feeling of resentment, and it is to the origin and growth of this opposition that I would direct attention.

In the past, lawyers have been great friends of the working man. Few things have done more to popularise the administration of justice amid the "working classes" than the erection and extension of County Courts. And up to the present the more inaccessible High Court has always commanded undisputed respect. The British working man and the public generally have always shown great respect for the administration of the Law. This is well shown by the frequent appeals to eminent lawyers on occasions of exceptional industrial or other emergency. Lord Mersey was hailed as an ideal president of the *Titanic* wreck inquiry. Several prominent lawyers were appointed to settle the minimum wage for miners under the recent Act.

But at the present time there undoubtedly exists a growing feeling of resentment and opposition. Let it be at once admitted that in all probability there always exists a certain amount of cause of complaint against the administration of justice. Judges may not all be perfect; decisions may occasionally be contrary to common sense; the law may sometimes be dilatory.

But the present opposition is no mere criticism of individual failings. It denotes a deep-rooted and growing hostility to the fundamental principles on which our Law is based. The outburst of 1911 is not yet forgotten. It will be remembered how certain decisions of judges on

election petitions did not command the approval of sections of the community, and how attempts were made in Parliament to denounce these decisions.

I think that there are two main causes for this opposition. In the first place we must consider the enormous growth in the power of Officialdom. Government functions have greatly developed in recent years, and side by side there has been a large increase in the jurisdiction of officials. Lawyers are often charged with an indecent desire to "feather their own nest." The charge would be difficult to substantiate, but it could certainly be made with equal justice against officials as a class. It is Officialdom that is largely responsible for the present discontent with the administration of the Law. It is usually officials who prompt Acts of Parliament. In the formation by officials of some new scheme to which Society is to be made to conform, it is not convenient that such scheme should be upset by an appeal to judicial Courts who are independent of official control. Thus it is that we find in recent Acts of Parliament that decisions of officials are to be final. To cite two instances only: the Town Planning Act and the National Insurance Act. The Workmen's Compensation Act, 1906, prevents all ordinary recourse to the Courts of Law.

For the public, this is a serious matter. Decisions by officials mean, usually, decisions behind closed doors. Judicial trial has at least the merit of publicity. There is there no chance for adverse influences being set at work. The independence and security of judges is a very different thing from that of officials who have political masters, who themselves have to consider constituencies and a Party.

It is precisely the independence of the administration of Justice that incites wrath in certain quarters. On 6th June, 1912, the *Daily News* declared, in a leading article, that

"The speculative solicitor ought to be abolished, but he will not be abolished until the State renders the Courts really accessible to all by making lawyers a public service." This reveals the aim of the "reformers." Lawyers of all kinds are to be converted into officials. A beginning has been made in the erection and development of the Land Registry, where all the subtle powers of Officialdom are used to bolster up an impossible system. There is no profession where individuality and personality have so much force as in the Law. Other professions (*e.g.*, doctors and valuers) are being gradually converted and brought under official control, and it is along this road that lawyers are to be driven. A start has been made with solicitors, and barristers are to follow.

The second point that I would urge is, that this opposition to present methods of administering Justice has developed, hand in hand, with the consolidation of Labour. One bitter cause of complaint is the attitude adopted by the Courts of Law towards Trade Unions. I admit that I wish our Courts had at the outset recognised the existence and inevitable growth of Trade Unions. But, if the present position of the law as to Trade Unions is unsatisfactory, Labour has reaped the advantages as well as the drawbacks. As Parliament has never supplied a system of Law to regulate Trade Unions, judges have perforce had to apply old Common-law doctrines.

But the spirit which animates modern Trade Unionists can brook no force which opposes it. Trade Unionism feels that it has suffered under recent judicial decisions; it forgets that it has also benefited. And it is Trade Unionism that is prompting these attacks upon the present administration of the Law. Federated Labour is finding itself in opposition to the Law, and, while it can bully the Legislature, it cannot overawe the Judiciary. We are at present only at the early stages of this antagonism. But no-one who reads

the signs of the times can ignore the existence of an ever-growing demand on the part of Democracy to control the administration of Justice. In America this demand is loud and Mr. Roosevelt has yielded to it. In England as yet there has been little complaint that the judges hold their offices independent of any elected authority. But it is important that we should recognise the depth and growth of the opposition to the Law as at present administered. The constant attacks in the Liberal press is a portent of real significance. It is hardly likely that the Liberal party will commit itself to a policy of attacking the independence of Justice. But the Trades Disputes Act, the present Osborne Bill and, more still, the frequent reduction of sentences at the dictation of Trade Unions all show the power that lies in Labour threats. The great profession of the Law has no cause to apologise for its existence, but lawyers would do well to realise what forces are at work. And the public would do well to watch developments with a careful eye. An independent and fearless Judiciary was the first essential bulwark against the aggressions of a despotic monarch. Its value is no less when the aggressor calls itself the People.

CLAUD W. MULLINS.

## IV.—FORM OF A WILL IN GERMANY.

A TESTATOR in Germany may make his Will in two ways, (1) either by writing the same with his own hand, or (2) with the assistance of a judge or notary.

The paragraph of the German Civil Code which prescribes how a Will may be made is paragraph 2231, and is as follows: "A Will may generally be made in the following manner:—(1) Before a judge or notary; (2) By

a declaration of the testator, written and signed with his own hand, stating the place where and the date at which it is made."

As to a Will made before the judge or notary, the testator may make an oral declaration of his last Will to the judge or notary, or deliver to him a written statement accompanied by an oral declaration, that the written statement contains his last Will. It is not necessary to seal the statement, neither that it should be written by the testator with his own hand. but though the law is silent upon the point it is advisable that the testator signs the statement for the purpose of identification.

For the purpose of superintending the making of a Will the judge must be attended by a registrar or two witnesses, the notary must call in another notary or two witnesses. The persons hereinafter mentioned may not take part as a judge, notary, registrar, or witness in superintending the making of a Will, viz.: the spouse of the testator, even though the marriage no longer subsists, any person who is related to the testator by blood or marriage in the direct line or within the second degree in the collateral line, thus parents, grandparents, great grandparents, father-in-law, mother-in-law and their ancestors, children and their issue, step-children and their issue, brothers, sisters, brothers-in-law and sisters-in-law of the testator cannot take part in the making of the Will but nephews and nieces and cousins may. The persons who are prevented as aforesaid from taking part in the making of a Will, are not only prevented by standing in the aforesaid relationship to the testator, but are so prevented if they stand in the said relationship to each other. Further, the prohibition extends to such persons to whom the testator has given or bequeathed anything by his Will, or to a person who stands in the aforesaid relationship to such legatee or devisee. Should any person act in the making of a Will, who is by law prohibited from

so doing, any gift or other advantage he might receive under the Will is null and void, but the Will in other respects is valid. Persons who are under age, who have been deprived of civil rights for the time for which the deprivation has been ordered, cannot be witnesses of a Will, neither can those persons be witnesses who according to the provision of the criminal code have been rendered incapable of taking an oath, or who are in the service of the judge or notary as a servant or employé. The notary, as will have been seen, cannot himself witness the Will or call in his clerks to do so, or any person who is in his employ, but must call in another notary or two independent persons for this purpose.

The persons taking part in superintending the making of a Will must be present during the whole proceedings, and it has been decided by the Highest Court of Appeal (Reichsgericht) that the parties must be present when the testator declares the Will as his, and it is not sufficient if they are only present or called in on the reading of the Will.

A protocol as to the making of the Will must be drawn up in the German language. This protocol must contain the name of the place and the date of the proceedings, the names of the testator and those persons who take part in the proceedings, the declarations which are required to be made by the testator, and in case where he delivers a written statement, the fact that the written statement has been delivered. The protocol must be read and ratified by the testator and he must sign it with his own hand. That this has been done must be stated in the protocol. Should the testator desire, he should on request be permitted to peruse the protocol, and should he state that he is unable to write, a record of such declaration is substituted in the protocol for his signature. The protocol must be signed by all the persons taking part in the proceedings. It is not necessary that the written statement containing the last Will of the testator should be read out or ratified by him.

even if such document is delivered open and not sealed. Should the testator not understand the German language then a sworn interpreter must be called in. The provisions applicable to a witness apply *mutatis mutandis* to the sworn interpreter. It has been decided that a clerical error in the year does not affect the validity of the Will.

The protocol must be translated into the language in which the testator makes his declaration. The translation must be made or certified and read out by the interpreter. The translation must be annexed to the protocol as an appendix. The protocol must state that the testator is not acquainted with the German language, the name of the interpreter, and that he has made the translation or certified it, and read the same. The interpreter must sign the protocol.

The protocol which is drawn up relating to the making of the Will, should, together with the appendices, and particularly when the Will is made by delivering a written statement, together with the written statement, be sealed by the judge or notary with his official seal in the presence of the testator and all persons who have taken part in the proceedings; and then an indorsement should be made more particularly describing the Will and the same should then be signed by the judge or notary, and be taken into official custody. The testator should receive a certificate that the Will has been taken into official custody. The non-observance of the provisions relating to the custody or sealing of the Will do not render it invalid.

As to the execution of a Will made by a declaration of the testator written and signed with his own hand, it may be observed that the testator must write the Will with his own hand and state thereon the place and the date when the same was written and executed by him, no witnesses are necessary, neither is the document required to be sealed, or is it necessary to deposit the same in official custody. The

necessary formalities, however, must be strictly observed, and the least mistake in this respect renders the Will invalid; further, the place where and the date when the Will was executed must be stated with correctness, but a clerical error in the date, provided the correct date can be ascertained from the document itself, and the application of other facts, do not affect the validity of the testament. Having regard to the fact that the Will must contain the correct date when the same was made, it follows that the giving of two dates does not make the Will invalid, provided that from the contents of the document, together with other facts, the true date of the making of the Will can be arrived at, or when it is to be seen that an earlier date refers to the commencement of making the Will and a later date as to execution thereof. In order to avoid difficulties it is advisable, should the Will not be written on one day, to insert the date of the day when the Will was finally written. Any addition to the Will must have another date and must again be signed by the testator. The name of the place where the Will was written and the date may be written under the signature of the testator. The testator must write every part of the Will with his own hand, therefore paper with a printed heading containing the name of a place or the date should not be used.

Every person can choose the form in which he will make his Will, *i. e.*, either by writing it with his own hand or with the assistance of a judge or notary. A minor or person who cannot read may make a Will only by oral declaration, that is before a judge or notary. A minor, however, can make a Will when he has completed his sixteenth year. Persons who are interdicted on account of feeble mindedness, prodigality, or habitual drunkenness, are incapable of making a Will. Such incapacity commences on the presentation of the application by reason of which the interdiction takes place.

The most practical course for an Englishman to adopt in making a Will in Germany is to write the Will with his own hand, avoid mistakes, and observe the provisions of German law as to stating the place where and the date on which it is made, and that the testator has written the Will with his own hand, and to add the usual attestation clause as added to Wills made in England, and have his signature attested by two independent witnesses.

HENRY HAPPOLD.

## V.—THE TRIAL OF LORD BYRON.

IN 1765 Society in London was startled by the news that Mr. Chaworth of Nottinghamshire had been killed by his cousin, Lord Byron, in a tavern in Pall Mall. The commission of such an offence by a nobleman was an amazing event. The last instance of the kind was in the case of Earl Ferrers, who was hanged in 1760 for the murder of his servant. The world had then been shocked by the spectacle of a member of the House of Peers dying on the scaffold, and some had even protested against the carrying out of the sentence. "It was esteemed," says Mr. Millbank in *Coningsby*, "a great concession to public opinion, so late as the reign of George the Second, that Lord Ferrers should be executed for murder. The King of a new dynasty who wished to be popular with the people insisted on it, and even then he was hanged with a silken cord." And now another nobleman was believed to have committed a similar offence, and the House of Lords was called on to sit in judgment upon one of their colleagues.

The trial of William, fifth Lord Byron, took place on the 16th and 17th of April, 1765. The Earl of Northington, Lord Chancellor, presided over the proceedings as Lord High Steward. The counsel for the prosecution were

Sir Fletcher Norton, Attorney-General, William de Grey, Solicitor-General, Serjeant Glynn, Mr. Cornwall, and Mr. Stowe. The prisoner was brought from the Tower with the axe carried before him, but with the edge turned away from him. According to the law of the time, he was not allowed to be defended by counsel. The facts, as they were put forward by the prosecution, were as follows.

On the 26th of January, 1765, ten gentlemen of rank and fortune in Nottinghamshire met, as they usually did once a week, to dine together at the Star and Garter tavern in Pall Mall. Two of those present were Lord Byron and his cousin, William Chaworth. The dinner was served at a quarter past four o'clock, and the bill and a bottle of claret was brought up at seven. About the time at which the bottle was brought up, the conversation turned upon the subject of game, and as to the best method of preserving it. Mr. John Hewett, who gave evidence, said he introduced the subject of game, "which," he said, "has very often, where I have been, produced agreeable conversation." In the course of the conversation Chaworth said that he believed there was not a hare in that part of the country but what was preserved by himself or Sir Charles Sedley. Lord Byron disagreed with this assertion, and offered a wager of £100 that he had more game in a manor or manors of his than Chaworth had upon any that belonged to him. Chaworth accepted the wager, and called for pen, ink, and paper, to make a memorandum of it. A little after this, Sir Charles Sedley's manors were again mentioned, and Lord Byron again intervened, exhibiting some degree of heat. "Sir Charles Sedley's manors!" he said, "Where are his manors?" "Why, Hucknall and Nuttall," replied Chaworth. "I know no manors of Sir Charles Sedley's!" exclaimed Byron. "Sir Charles Sedley has a manor," insisted Chaworth. "The manor of Nuttall is his, and one of his ancestors bought

it out of my family, and, if your lordship wants any further information about his manors, Sir Charles Sedley lives in Dean Street, and your lordship knows where to find me in Berkeley Row." After this dispute Byron and Chaworth entered into conversation with the rest of the company upon indifferent subjects. Byron was observed to be in good humour, and the company thought that there had been an end of the quarrel, and that no more would be heard of it.

About eight o'clock, an hour after the first quarrel, Chaworth went out of the room, and George Douston went after him to the door. Chaworth asked Douston whether he had observed the dispute between him and Byron. Douston replied that he had in part. Chaworth thereupon asked him if he had been short in what he last said in his discourse with Byron. Douston said "No," adding that he thought Chaworth had said rather more than what was necessary upon so trifling an occasion, and that he did not believe that either Byron or the rest of the company would think any more about it. Chaworth then went on downstairs, and Douston returned into the room, and, as he opened the door, met Byron coming out. Byron, seeing Chaworth upon the stairs, said to him, "Sir, I want to speak with you." They then went down one pair of stairs and one or other of them called out "Waiter." John Edwards, one of the waiters in the tavern, came at the call, and Byron asked him whether any of those two rooms (pointing to them) were empty? The waiter opened one of the doors and went in, with a small tallow candle—"a common tallow candle," said the waiter, "about eight in the pound"—which he set upon the table. There was a fire in the room, but it was low, and the only light was afforded by the candle.

Byron and Chaworth went together into the room which the waiter had shown them. When they were there, the

former asked the latter whether he was to have recourse to Sir Charles Sedley to account for the business of the game, or to him. Chaworth replied, "To me, my lord, and, if you have anything to say, it would be best to shut the door, lest we should be overheard." Chaworth shut the door, and, on turning from the door, saw Byron just behind him with his sword half-drawn or nearly drawn. At that instant Byron called out, "Draw!" and Chaworth drew as quickly as he could. Chaworth gave the first thrust and entangled his sword in Byron's waistcoat, which made him think he had wounded his opponent. Feeling his sword entangled, Chaworth tried to disarm Byron, whereupon the latter shortened his sword and thrust it into the abdomen of Chaworth, causing it to come out at the back. Chaworth again tried to disarm Byron, and this time with success, Byron exclaiming, "By God, I have as much courage as any man in England."

The bell was rung by one or other of the combatants, and John Gothorp, a waiter, came up. When Gothorp went in, he found Byron with his left hand round Chaworth's waist, and Chaworth with his right hand resting upon Byron's shoulder. Alarmed by this sight, he ran out again, and sent up James Fynmore, the master of the tavern. Fynmore found the two men grasped in each other's arms, each holding his sword. Chaworth handed his weapon to Fynmore, and Fynmore took hold of that of Byron, who made no objection. One of them said to the master of the tavern, "Get some help immediately," and a messenger was despatched for Cæsar Hawkins, the surgeon, who speedily arrived. While they were waiting for Hawkins, the alarm was given upstairs, and, on his friends entering the room, Chaworth told them how the affair had happened. When Hawkins came, he found that the wound was mortal, and ordered his patient to be conveyed home. Chaworth had sent for Mr. Levinz, his uncle, whom he appeared

extremely anxious to see. When that gentleman arrived, he immediately asked his nephew what had brought him into that terrible situation. Chaworth told Levinz the whole transaction, and, on his relating how Byron had drawn or nigh drawn his sword, when he was shutting the door, Levinz asked him, "Was this fair, Billy?" Chaworth, "who," said the Attorney-General, "was one of the most benevolent, as well as one of the bravest of men," gave no answer to that question. Levinz asked some other questions, and the answers amounted in substance to this, that Chaworth did not think, when Byron took him into the room, that he had any design of fighting him, but that afterwards Byron thought that he had got him at an advantage, and that that was the reason of his challenging him. Chaworth lingered for some hours after he received the wound, suffering at times great agony. At 9 o'clock on the morning of the 27th January he died.

Such then was the story put forward by the prosecution. Byron drew up a statement, in which he set forth his version of the incidents of the night. He said that Chaworth had treated him in a slighting and contemptuous manner in the conversation about game. He stated that, when he went out of the room, he found Chaworth standing, as if waiting for some one to come out, and that Chaworth said in a very particular and significant manner, and not as a question either of civility or respect: "Has your lordship any commands for me?" Byron alleged that, when they went into the room, he said to Chaworth, "How am I to take those words you used above? As an intended affront from Sir Charles Sedley or yourself?" and that Chaworth replied, "Your lordship may take them as you please, either as an affront or not, and I imagine this room is as fit a place as any other to decide the affair in." Byron said that Chaworth made two thrusts at him, which he parried, and then they both thrust at the same

time. He said that Chaworth cut his waistcoat and shirt for upwards of eight inches, and that he felt his sword against his ribs. "I suppose," said Byron, "it was then that he received the unlucky wound, which I shall ever reflect upon with the utmost regret."

It would be idle at this time to inquire how far Byron's modification of the case put forward by the prosecution was true. As far as the incidents in the room are concerned, there is only Chaworth's word as against Byron's word. But there are one or two features in the case which tell in favour of Byron. Chaworth's remark to Byron, "Your lordship knows where to find me in Berkeley Row," was certainly in the nature of a challenge, and suggests that Chaworth was under the influence of irritation or bad feeling. After the challenge was made, it was not denied that Byron was in good humour, which rather inclines one to think that he had not taken the challenge seriously. It is clear, on the other hand, that Chaworth had not got over his feeling, for he spoke to Douston about his altercation with Byron, when he went out of the dining-room. It is also clear that before Byron stabbed Chaworth, the latter had made a thrust at Byron, for he admitted that his sword became entangled in Byron's waistcoat. Chaworth could not therefore have been attacked by Byron before he was in a condition to defend himself. But even assuming Byron's story was true, the verdict of manslaughter was a correct one, and justified by Byron's version of the incidents of the night. (*Archbold's Criminal Pleading*, 24th edit., pp. 881–2.)

After a speech by the Solicitor-General, and after Byron's statement had been read, the peers gave their verdict. Four of them, Lords Beaulieu, Le Despencer, Falmouth, and Orford, said, "Not guilty." All the other peers said, "Not guilty of murder, but guilty of manslaughter." Byron thereupon claimed the advantage of the statute of Edward the

Sixth, chap. 12, which allowed him benefit of clergy, and he was discharged on paying his fees.

The subsequent history of Byron was melancholy. Although he escaped punishment, he became a marked man. He lived in seclusion at Newstead Abbey, his country home, and became known to the neighbourhood as the "wicked lord." He ill-treated his wife, and saw all his children and his only grandson die before him. He encumbered his estates, and made a sale of his property at Rochdale, the disputed legality of which led to a prolonged lawsuit. He died in 1798, when he was seventy-five years of age. He was succeeded by his great-nephew, George Gordon, sixth Lord Byron, who became so eminent as a poet.

J. A. LOVAT-FRASER.

## VI.—LEYRWIT.

AMONGST the numerous amercements to which bond-tenants and others holding in villainage by villain service were liable, that of leyrwit, or the fine for unchastity, gives rise to several interesting points.

Like the merchet, or fine paid by the villain for leave to give his daughter in marriage, leyrwit was not necessarily a custom of every manor, but though one frequently finds on the Court Rolls fines for merchet without mention of leyrwit, one never finds the leyrwit unless the custom of merchet obtains in that particular manor. From this one would feel inclined to predicate that the merchet gave rise to the leyrwit, and that had there been no merchet, there would have been no leyrwit. If we look into the matter, the object of fining the daughter of a bond-tenant for leyr seems apparent enough. The lord on every marriage is paid a fine for giving his consent. A woman who was

habitually unchaste jeopardised her chance of getting a husband, and so the lord was like to lose his merchet. Perhaps the best answer to the question as to what was originally the object of the leyrwit is to be found in the following excerpt from the Cartulary of Glastonbury: "*Si nul de neffes folement se porte de son corps parque le seignour perd la vente de eux.*"

So far as one can gather from the Cartularies and Manorial Rolls, practically our sole source of information on this subject, the leyrwit, like the merchet, was a badge of personal slavery. Wherever such a custom obtained, every villain, and probably every free man holding in villainage by villain service, was subject to it.[1]

The Ramsey Cartulary for instance, is very plain on the point as the following excerpts show: "*Dabit pro filia sua de leyrwyth, duos solidos, et postea quotiens cumque pregnans fuerit, vel manifeste fornicata fuerit ad plus duos solidos.*[2]

*Et pro leuerwit de filiabus, de qualibet filia super hoc convicta duos solidos, vel minus si paupertas exposcat.*[3]

Judging from the above one would feel inclined to hold that the leyrwit was a fine imposed by the lord on his bond-tenants in order that they should safeguard the chastity of their daughters, so that the lord might have as many marriageable *neffes* on his manor as possible. One might feel inclined to go further and say that, unlike the penance or other punishment inflicted by the Court Christian for incontinence, a punishment which was imposed ostensibly *pro salute animae*, the leyrwit was rather in the nature of a penalty imposed for the protection of the lord's right of merchet. Yet if we look carefully at the Manorial records we shall find that this theory is not altogether correct.

[1] *Vide* Martin of Bestenover's case as to merchet, and an entry on Halmot Rolls of Prior and Convent of Durham (Surtees Society), p. 13, De Preciosa filia Vicarii pro leyrwit 6d. The Vicar must have been a free man.

[2] *Cartularium Monasterii de Rameseia*, Rolls Series, Vol. I, p. 416.

[3] *Ibid.*, Vol. III, p. 61.

would seem that the leyrwit, if not originally, did in time become something in the nature of a police measure. Let us take the Court Rolls of the Manors of the Prior and Convent of Durham, whereon entries of fines for leyr are exceptionally frequent. All through the rolls we come across cases like the following:—

. . . . *gton Matild' filia Kynge pro leyr.* 6d.[1]

*Akeley. De Alicia ancilla magn' Johannis pro eodem* [leyr]. 6d.[2]

*Scheles. De Diota Brounyng, Alicia quondam ancilla Ricardi Barker, ancilla Roberti Loschulder pro leyr Agn' Hayn' Alicia de Boynton.* 3s.[3]

The above bond-women, let us say, being guilty of unchastity were fined, so that the lord might not suffer damage by his loss of merchet. On the same rolls, however, we also find the following:—

*Wallesend. De Christiana, ancilla Willelmi capellani pro leyr cum capellano.* 2s.[4]

*Hesylden. De Margareta Calverd pro eodem (leyr) cum capellano.* 12d.[5]

In the above cases we get an increase in the fine, because the act of incontinence is committed with a chaplain. Now, so far as damage to the lord is concerned, it is immaterial whether the act is committed with a chaplain or a ploughboy, though possibly the moral offence in the former case may be the graver. Is the offence of leyr beginning to be something more than an act which may prejudice the lord in his rights, and the offender amerced, not solely according to the custom, but also as an example to the Manorial community?

[1] *Halmota Prioratus Dunelmensis*, 1296—1383, Surtees Society, p. 2.
[2] *Ibid.*, p. 13.
[3] *Ibid.*, p. 143.
[4] *Ibid.*, p. 27.
[5] *Ibid.*, p. 74.

Again we find the fine increased for leyr in adultery, as the following cases show:—

*Boulu. De Ivetta Horner pro leyr in adulterio.* 2s.[1]

A still stronger proof have we that the fine for leyr was imposed not solely to protect the lord in his right of merchet, in that married women were subject to the leyrwit.

*Moreslawe. De Alicia uxore Johannis Punchon pro leyr in adulterio cum ii hominibus.* 2s.[2]

*Est-M'. De Is' uxore Roberti filii Ricardi pro leyr.* 6d.[3]

Now, if the only idea of the leyrwit was to protect the merchet of the lord, there would be no ground for fining the married woman for unchastity. This brings us to another view of the matter, viz., how far a fine for leyr was imposed by the lord to protect his chattels[4] from being dissipated by tenants who were cited before the Courts Christian for incontinence and adultery.

In the *Curia Baronis*, an early book of precedents for holding Baronial Courts, we find the following:—

> "Whether any bondman's unmarried daughter hath committed fornication and been convened in chapter and what she hath given to the dean for her correction."[5]

Now it might well have happened that the bondman's daughter, not being able to clear herself of the charge of incontinency, may have been sentenced by the rural dean to *vj fustigationes circa ecclesiam*, or some such punishment *pro salute animæ.* Mother Church, however, had a way of commuting such penances, and would have let her go with a warning on payment of six pence. If, according to the theory, all the chattels of the bond tenant belonged to the

[1] *Halmota Prioratus Dunelmensis*, p. 13. [2] *Ibid.*, p. 26. [3] *Ibid.*, p. 134.

[4] It was held, theoretically at least, that a bond-tenant could have no goods of his own, but all he had belonged to his lord.

[5] *The Court Baron* (Selden Society), p. 102.

lord, the lord was put to damage by the misfeasance of his tenant in paying a fine to the Court Christian. The result was that the tenant was punished twice, being fined also by the lord for losing the lord's goods.[1]

Cases like the following, which were tolerably frequent, go to show that the lord did exercise a kind of moral jurisdiction over his tenants by fining them for incontinence, which fines, though frequently classed under the head of leyrwit, have nothing to do with the offence of leyr, in that men are frequently the offending parties.

> "And they say that John Monk still continues his luxury with Sarah Hewen wife of Simon Hewen, and is constantly attending divers chapter courts where frequently he loses the lord's goods by reason of his adultery with Sarah, as has often been presented before now, nor will he be chastened (*i.e.*, he pays a money fine instead). Therefore be he in the stocks. And afterwards he made fine with one mark on the security of John Lock etc., etc. . . . . and all the said pledges undertake that if the said John at any time hereafter be again convicted of adultery with the said Sarah, they will bring him back and restore him to the stocks, there to remain until they have some other command from the lord or steward."[2]

Now the chief offence of John Monk seems to have been, not so much his adulterous intercourse with Sarah Hewen, as his preferring to pay money to the Archdeacon rather than be publicly disciplined. This fine for wasting the lord's goods was a way of imposing the leyrwit on men, though Maitland seems to suggest that the theory that all the villain's goods belonged to his lord, was a fiction whereby the lord was enabled to exercise a paternal control in the interests of morality.[3]

[1] The theory that the bond-tenant's chattels belonged to the lord was a theory only, but it seems to have been a sufficient excuse to get an additional fine out of the tenant under these circumstances.

[2] *Select Pleas in Manorial Courts*, p. 98.

[3] *Ibid.*, note, p. 98.

Again, on the roll of the Manor of Brightwaltham, we find the following:—

"Also they present that Heny Nywe and Ellen widow of Walter Hayward are impleaded in Court Christian [for adultery] and make fine out of the chattels of the lord that they need not do penance enjoined them; therefore it is commanded that thenceforth they make no such fine and be in mercy.[1]

The roll of the Manors of the Abbot of Ramsey gives us the following entry:—

"And they say that Maggie Carter has born a child to Richard son of Thomas Male out of wedlock. Fine of both of them 6d."[2]

Now the fine which was imposed on Maggie Carter was undoubtedly the leyrwit. Men, however, were not fineable for leyr, and yet Richard of the entry is fined sixpence for getting Maggie Carter with child.

To return to the subject of leyr proper, the question—who was liable to pay the fine, is not by any means a simple one. It must not be forgotten that the Manorial rolls were kept rather with a view to show the lord who was liable to pay him money, and as a check on his steward, than for detailed memoranda of what transpired in his Court. One would be inclined to say that originally it was the father who was liable to pay a fine when his daughter was guilty of leyr. The words in the Ramsey Cartulary are certainly explicit on this point—"*Dabit pro filia sua de leyrwyth duos solidos.*"

No doubt that when a daughter was living under her father's roof, it was he who paid the fine. Supposing, however, that the girl was an orphan or dwelling in the capacity of servant, or otherwise with a bond-tenant of the lord, shall we be correct in stating that her master would

[1] *Select Pleas in Manorial Courts*, p. 162.    [2] *Ibid.*, p. 92.

be looked to to see that the fine was paid? Judging by the following entries on the rolls of the Manors of the Prior and Convent of Durham, this possibly may have been the case.

*Dalton. De Elizabet de Cleveland pro leyr pleg' Robertus Langbayn quia eam inhospitat respondebit:* 6d.

*De Elizabet ancilla Adae de Hesilden pro eodem: pleg' idem Adam quia eam inhospitat respondebit:* 6d.

*Hesylden. De Cecilia Oulry, Cecilia de Hert pro leyr unde Robertus firmarius respondebit quia eam hospitavit et praemunitus (? praemonitus) fuit per praepositum de altera earum.* 6d.[1]

In the above cases it would seem that the pledges or sureties were held responsible by the lord, in that the women were under their (the pledges') roof. An additional reason is given in the case of Cecilia Oulry and Cecilia de Hert, viz., that Robert, who was ordered to answer for them, had been warned by the reeve, whether of their light behaviour or what the record does not tell us.

In endeavouring to arrive at a conclusion as to whether or no the woman was herself liable to pay the fine for leyr one must take into account what means the lord had of compelling payment. It is true we have the isolated instance of John Monk being set in the stocks for frequently appearing before the Arch Deacon for adultery, but it is doubtful if the lord often proceeded to such extreme lengths. But that he had a means of enforcing payment may be gathered from the following cases:—

*Aeley. Praeceptum est distringere fil' Thomae Perkynson pro mercheto quous-que carta ostendatur.*[2]

It may be fairly presumed that the daughter of Thomas Perkynson held land of the lord, and so a sufficient number of her chattels were seized, say a cow, or a pig, and held for payment of her fine.

[1] Rolls of Prior and Convent of Durham, p. 74.
[2] Rolls of Prior and Convent of Durham, p. 51. The fine here was for merchet, but the offence is immaterial.

If the party refusing to pay the fine had no goods, and so could not be distrained, it would seem the lord could attach her person.

Thus Alice, daughter of Richard Watson, had a sweetheart, whom she eventually married without the lord's licence. Accordingly she was presented and cast for leyr as well as merchet, in the sum of two shillings. This sum she appears not to have paid, and we find the following entry on the rolls:—

> "*Injunctum est praeposito quod attach fac' Alic' fil" Ricardi Watson nativae (sic) domini ad essend hic ad prox ad satisfaciend domino de eo quod se maritavit sine licencia domini. Postea venit et fecit finem.*[1]

But the lord had yet another way of bringing a recalcitrant *neffe* to her knees. He could drive her out of his domains by issuing an order to his villains that no one was to harbour her under a severe penalty. Thus, for some reason or other Katerina de Neusom had brought down upon her head the displeasure of the lord prior, and under *Hetheworths* we read:

> *Injunctum est Ranulpho del Kitchin quod non teneat Katerinam de Neusom infra villam, nec veniat cum ea in loco suspecto sub poena. C. S.*[2]

Later we find:—

> *De Joh Tailliour quia inhospitavit Caterinam de Neusom contra inhibicionem dom Prioris de poena imposita. C. S.*[3]

Still more illuminating is the case of Agnes Souter:—

> *Bellyngham . . . . et eciam quad nullus eorum inhospitent Agn. Souter, nec eam sustentat (sic)—in victu et vestitu sub poena xls solvend etc. De John Miryman quia inhospitavit Agn. Souter contra defens dom Prioris de poena xls.*[4]

[1] Rolls of Prior and Convent of Durham, p. 126.
[2] *Ibid.*, p. 166.
[3] *Ibid.*, p. 168.
[4] *Ibid.*, p. 167.

Probably it was only on rare occasions that the lord outlawed his *neffe;* a distraint upon her chattels or on the chattels of those who were responsible for her, being sufficient. In the event of her being very poor, the wind was tempered to the shorn lamb, for the Ramsey Cartulary distinctly says: "*Vel minus si paupertas exposcat,*" while in an entry on the rolls of the Manors of the Abbey of Ramsey, we read: "And Agnes Cuttyle has borne a child out of wedlock—she is poor!" Frequently we come across instances where the fine is forgiven or greatly reduced.

It would be interesting to discover down to what date the fine for leyr came. The custom may have still existed in the early part of the 15th century, but I have seen no entry of later date than 1383. As bond-tenants gradually became copyholders most of the servile customs passed away, the merchet being one of the first to go. With it, we may be sure, the leyrwit also disappeared.

ARTHUR CLEVELAND.

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## VII.—THE RIGHTS—AND WRONGS— OF PARENTS UNDER THE EDUCATION ACTS: A REJOINDER.

THE contribution by Mr. Proudfoot on this subject, which appeared in the November issue of this magazine, may be taken as the unofficial defence of the policy of the N.S.P.C.C. It reminds me of the answer of a Somerset House Inland Revenue Official, who, when I hinted that a certain practice of his office was not in accordance with justice, replied, "Justice, we have nothing to do with justice here; the only question is, Is it within the four corners of the Act?" In that spirit Mr. Proudfoot appears to deal with the *Carter Case*. He points out that Carter was convicted in due form

of law, and says that he ought to have called rebutting medical evidence, ignoring the fact that Carter based his opposition on the point of the risk of death incurred by the use of an anæsthetic, a risk admitted to exist by the prosecution, though they claimed that the risk was slight. The real question after all was, Is a parent obliged to submit his child to the risk of death, however small the risk, for a problematic or even actual benefit? It was really not necessary for him to call further medical evidence in order to get this point decided. Mr. Proudfoot's claim that Carter, a poor labouring man, should call expert evidence in opposition to the official doctor, irresistibly reminds one of the famous witticism of Mr. Justice Maule, who, in sentencing a prisoner for bigamy, told him that his proper course would have been first to bring an action for *crim. con.* and then to have promoted a Bill in Parliament for the dissolution of his marriage, after which he could have safely committed the bigamy. Similarly, Carter, a labourer, earning less than 20s. a week, ought to have employed a solicitor to defend him, and to have called expert medical evidence to rebut the official view, and then, if convicted, to have had a case stated for review in the King's Bench. Of course the idea of his doing all this is grotesque. He goes as a criminal to prison and hard labour instead, although the only "cruelty" consisted in exercising his parental discretion as to whether his daughter should run any or the slightest risk of losing her life for the sake of a possible advantage. To style such conduct "cruelty" is to strain the meaning of the word, and I think, notwithstanding Mr. Proudfoot's opinion, may fairly be styled a revival of the legal fictions of law. There is obvious risk in thus extending or straining the meaning of such simple words as "cruelty." Indeed, there is really no reason why the Act should not be used to convict a mother of "cruelty" who failed to give her constipated child its usual spring dose of brimstone and treacle. And

would it not be possible also under this strained interpretation to convict of "cruelty" anyone, who, being told that his child to recover must be sent upon an expensive sea voyage, failed to comply with the medical prescription by reason of inability to pay for it? But let us suppose that Carter had called in another doctor, who, like the official doctor, advised the operation notwithstanding the risk to life. The question would still have to be decided, was Carter as the parent entitled to exercise his discretion as to that risk? Whether the risk is great or small is, of course, beside the question.

But what if Carter's medical evidence had been antagonistic to the official view. It would have fallen to the Bench to decide between the conflicting medical testimony. Laymen would have to decide which medical opinion was correct. And in these days of working-men J.P.'s, the idea of a working-man magistrate, who might know no more of medicine than the working-man defendant, having to decide between the conflicting medical views is not without its droll aspect. How far the doctors themselves would approve such a tribunal may very well be doubted.

Mr. Proudfoot maintains that it has not been proven that there is any divergence of "eminent" surgical opinion as to the beneficial results to be derived from the operation for cleft palate. However, that may be, the surgical evidence gathered together on behalf of Carter, certainly did show that such a divergence between "eminent" medical opinion actually existed. And, of course, quite apart from the *Carter Case*, it is notorious that there are many as to which there is a marked difference of medical opinion. In such cases, when they come before a Court of Justice, whether Mr. Proudfoot likes it or not, the ultimate decision as to which is the correct medical view will rest with the lay tribunal, justices or jury, which is not possessed of expert medical knowledge.

Mr. Proudfoot makes a serious mis-statement as to my views, doubtless unintentionally, in saying that I make the claim that a parent "may neglect to provide medical aid for his child." My statement was intended to relate only to the right, as it appears to me, for the parent, under the last clause of the Education Act, 1909, to withhold his child from the school medical examination and school medical treatment.

It seems wholly overlooked that Carter's objection to the operation before the magistrates did not take the form of dealing with the surgical character of the case, which obviously he was incompetent to discuss, but with the danger to his child's life from the anæsthetic, which danger is admitted to exist, although it is claimed to be very slight. Obviously this is a point entirely distinct from any divergence of opinion as to the surgical aspect of the case, and it is submitted that there is no right inherent in the N.S.P.C.C. or any other person to compel a parent to submit his child to the risk of death, even though the risk be "slight."

Mr. Proudfoot draws a pathetic picture of the child Ethel Carter who remains unoperated on through the perverse action of those who frustrated the beneficent intentions of the N.S.P.C.C. to cure the child by giving notice to the hospital authorities not to perform the operation. But he omits to explain why the N.S.P.C.C., after that notice had been given, should have hastily applied to the justices to revoke the order granting them the custody of the child, thus effectually preventing the question of the legality of the performance of such an operation contrary to a parent's wish being discussed in the King's Bench Divisional Court.

The N.S.P.C.C. has doubtless done much useful work in the prevention of positive cruelty to children, but it may be seriously questioned whether it be not overstepping its functions in dealing with cases of negative "cruelty" like Carter's. The procedure adopted in the *Carter Case*

by the N.S.P.C.C., in putting forward their claim to act practically as ultimate guardians to the school children of England, hardly appears to me to be very commendable. An order is obtained, on the strength of a conviction for "cruelty," for the custody of the child to be entrusted to them. In due course, the child, an infant of five, is practically kidnapped, with all proper legal formalities, torn from its mother's arms and carried off to a London hospital, while, from the time the notice forbidding the operation was served until the application for the nullification of their own custody order was made, the parents were apparently kept in absolute ignorance of the child's whereabouts. All this, however well-intentioned on the part of the N.S.P.C.C., can only be described as cruelty. Finally, the procedure of bringing to bear the criminal law against a respectable parent whose only offence is a refusal to allow his child to undergo an operation which certainly involved a risk of death, can only be described as a tyrannous action and an unjustifiable straining of the intentions of the Children Act.

W. P. W. PHILLIMORE.

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## VIII.—THE CRIMINAL EVIDENCE ACT 1898.

IT is proposed first to treat of the right of an accused person to make an unsworn statement from the dock, which pre-existed the passing of the Criminal Evidence Act, and received a statutory consecration by sect. 1 (H) of the Act. The two rights, that of making an unsworn statement and of proffering sworn evidence are, as will be seen, to be distinguished in material respects, but it is probably due to historical reasons that the right of making an unsworn statement was never valued, and even finally questioned, shortly before a prisoner was allowed to offer

evidence on oath. There are many historical traces which will be alluded to, that to question a person charged with an offence was opposed to the whole feelings of the English people; and while this sentiment prevailed, the right of a prisoner to make an unsworn statement could never have been much cherished as it led to what was regarded as an abuse. It is, nevertheless, obvious enough that, possibly, from a merely negative point of view, the two subjects are allied as a matter of history and reasoning.

It confirms this view that there has arisen an interaction in practice between the two rights and the Criminal Evidence Act; as, though a prisoner has no right to read his statement in the box, and on oath, he is allowed to do so by most judges.[1] But on the authorities, the right of a defendant to make an unsworn statement is quite distinct from his right to give evidence.

Channell, J., has observed in the Court of Criminal Appeal,—"Counsel know the danger which often exists in calling the prisoner, and so they seek to say that his statement is the same thing."[2] But, in moving the second reading of the Criminal Evidence Bill in the House of Lords, Lord Halsbury, C., observed that it was "an illusory reply" to the objection that a defendant in a criminal case could not tell his own story to say that he could make a statement.[3] Lord Coleridge, L.C.J., who refused to extend the rule laid down by the majority of the judges, that it was undoubtedly competent for the prisoner to make a statement of facts to the jury, to cases where the prisoner elected to call witnesses (*R.* v. *Millhouse* [1885], 15 C. C. C. 622), considered that a prisoner ought to be allowed to give evidence.[4] In *R.* v. *Shimmin*,[5] Cave, J. also distinguished

[1] *Elliott's Case* [1909], 2 Cr. App., R. 171, 172.

[2] *Curley's Case* [1909], 2 Cr. App., R. 97.

[3] *The Times*, March 11, 1898, p. 6.

[4] Speech of the Earl of Halsbury, C., H.L. Crim. Evidence Bill, March 10, 1898, quoting Lord Coleridge's opinion *supra*.

[5] 15 Cox's Cr. Cas. [1882], 122, 124.

between the right of a prisoner to make an unsworn statement to the jury, and his right to give evidence on oath, observing:—"True, his statement was not made on oath, and he was not liable to be cross-examined by the prosecuting counsel, and what he said was therefore not entitled to the same weight as sworn testimony."

Yet, it appears necessary to conclude that all the above distinctions between the right of the accused to make an unsworn statement, and his right to proffer sworn testimony, are directly affected by the indulgence allowed to prisoners by most judges of reading their statements in the box and on oath. This indulgence appears an advantage to the prisoner in two ways, it not only means that, contrary to the Resolution of the Judges on November 26, 1881, a prisoner can be cross-examined on his statement, which thereby gains weight if it is true, but it also implies that the prisoner is allowed to put leading questions to himself at his examination-in-chief.[1]

The history of the right of a prisoner to make an unsworn statement was given by Stephen, J., in *R.* v. *Doherty* ([1887], 16 Cox Cr. Cas., 306, 310), where the learned judge pointed out that its existence was to be accounted for by analogy to the survival of the right of a person charged with treason to make an unsworn statement, long after the prisoners were entitled to make a full defence by counsel at the trial of an indictment for that offence. The reason why Stephen, J., ascribed so much importance to an analogy derived from the law of treason, seems to be that, till the Trials for Felony Act 1836, "trial for treason," in the words of Sir Frederick Pollock, A.-G., "in modern times, are specimens of the fairest trials that take place."[2] The last persons

1 *Per* Channell, J., in delivering the judgment of the Court of Criminal Appeal in *Elliott's Case* [1909], 2 Cr. App., R. 171, 172. In this case, after the prisoner went into the box his statement was read for him by the Deputy Chairman of Quarter Sessions.

2 Rep. Comm. Cr. Law, Parl. Pap. 1836, Cd. 243, p. 76.

indicted for high treason who made unsworn statement to the jury were the Cato Street conspirators, Thistlewood and Ings, in 1820; and at the last trial for high treason in this country the accused neither made an unsworn statement nor gave evidence, as of course he could have done, as the Criminal Evidence Act 1898, by sect. 1, applies to every person charged with an offence.[1]

In the seventeenth century the right of a person to make an unsworn statement to the jury involved his being questioned upon it by the judge, and this led to great abuses. In his notice of Ashton's trial, Hallam remarks that, "no judge, however, in modern times would question, much less reply upon, the prisoner, as to material points of his defence, as Holt and Pollexfen did in this trial."[2] Sir James Stephen states that Sir John Holt, at the trial of Dr. Harrison for the murder of Dr. Clench, questioned the prisoner at some length.[3] The great historian of the criminal law also concludes that this practice of questioning prisoners fell into desuetude during the period of the reigns of William III, Anne, George I, and George II. It is curious to note that while Sir James Stephen seems clearly to disapprove of Sir John Holt, C.J., "questioning" prisoners, in another part of the *History of the Criminal Law*, he expressly advocates the questioning of prisoners under oath, in order that the real defence might get to the jury. Thus, after saying that from the first there is a complete absence of fierceness and brutality in the conduct of criminal trials after the Revolution, Sir James Stephen adds, "At first there are a few instances in which prisoners are questioned."[4] It is also remarkable that Lord Campbell, whose apostrophe to the

[1] *R.* v. *Lynch* [1903], 19 T. L. R. 163.

[2] Hallam, *Const. Hist. Engl.*, ch. xv, p. 374. Trial of Sir Richard [illegible] and others for High Treason [1691], 12 How. St. Tr. 646, 668, 779.

[3] *Hist. Cr. Law*, Vol. I, p. 417 n. Trial of Harrison for the Murder of Dr. Clench [1692], 12 How. St. Tr. 859.

[4] Stephen, *Hist. Cr. Law of England*, Vol. I, ch. xi, p. 417

memory of Chief Justice Holt gleams with all the brilliancy of a diamond,[1] and who, unlike Hallam, offers what appears to be a thorough-going defence of his conduct of the high treason trials of the Jacobites,[2] nevertheless admits that, "to the end of Holt's life, he persevered in what we call 'the French system' of interrogating the prisoner during the trial, for the purpose of obtaining a fatal admission from him or involving him in a contradiction."[3]

It is submitted that, according to the then attitude of public opinion, Lord Campbell intended by this expression to convey a censure of the practice of interrogating the prisoner. In giving evidence before a Parliamentary Commission which reported on the Criminal Law in 1836, Sir Frederick Pollock, A.-G., acquiesced in an unfavourable question addressed to him regarding "the speculative question with foreign jurists of the power of examining the prisoner."[4] The expressions used by Hallam (already mentioned) confirm the view that Lord Campbell must have intended to censure the practice of questioning prisoners.

This censure must doubtless be only accepted subject to the then state of the law of evidence. Lord Denman once described the law of evidence as "the neglected product of time and accident," and we owe the rules of evidence to the reaction against the brutality of Scroggs and Jefferies. The law of evidence virtually dates from the Revolution and the Chief Justiceship of Sir John Holt.[5] The rule

1 Campbell, *Lives of the Chief Justices*, Vol. III, ch. xxv, p. 5 (1710). This appears to show that Sir James Stephen disapproved of the practice of questioning prisoners, but, it is submitted, only of the practice as it then obtained.

2 *Lives of the Chief Justices*, Vol. II, ch. xxiii, p. 413 (1696).

3 *Ibid.*, *supra*, ch. xxv, pp. 9, 10.

4 Rep. Sec. Comm. Cr. Law; Parl. Pap. 1836, Cd. 343, p. 77. As to Sir Frederick Pollock, A.-G.'s, disapproval of the proposal that a prisoner should give evidence, see *post*, p. 185.

5 The doctrine of *res gestae* is said to date from 1693, in which year *Thomson v. Trevanion* (Skinner, 402) was decided. *Per* Lord Ellenborough, C.J., in *Aveson v. Kinnaird* (6 East 188, 1805). The doctrine of *res gestae* in the Law of Evidence, *Law Quarterly*, No. 76, October 1903, pp. 435-6; by Sydney Phipson.

about the inadmissibility of evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment (*R.* v. *Bond*, L. R. [1906], 2 K. B. 389), is indubitably due to Sir John Holt, C.J.[1] Lord Campbell observes that it is wonderful how many of Lord Mansfield's decisions turn upon the law of evidence, and that we are chiefly indebted to Lord Mansfield for "our established rules upon this important subject."[2] It must doubtless be remembered that the questioning of prisoners censured by Hallam, Lord Campbell, and Sir James Stephen, was when there was no conception of the true nature of legal evidence, and when the judges did most of the cross-examination themselves.[3]

The baleful traditions of the judicial tragedies of the 17th century, and the fact that the judges who took part in them cross-examined prisoners, may have inspired the Resolution of the majority of the judges, November 26, 1801, which allowed an accused person to make an unsworn statement to the jury, but inhibited his being asked any question upon that statement.[4]

If the reason for it were not purely historical, it would be difficult not to consider that the inhibition under the Resolution does not stand in an inconsistent relation to sect. 1 (e) of the Criminal Evidence Act 1898, rendering a prisoner liable to be cross-examined upon his sworn evidence. When the policy of introducing that measure was being discussed, Lord Collins, in a communication on the subject, objected that, proceeding by previous experience gained under the

[1] See Campbell, *Lives of the Chief Justices*; Vol. II, ch. 23, p. 408.

[2] *Lives of the Chief Justices*, 3rd Vol., ch. 34, pp. 303, 4.

[3] Stephen, *Hist. Crim. Law*, Vol. I, p. 399; where it is observed that there were only two small rules at all observed in the 17th century, the hearsay rule, and that requiring two witnesses in treason. Sir James Stephen observes that the last was strictly pursued, but it was clearly infringed by Jefferies, C.J., in *Sidney's Case*.

[4] *R.* v. *Shimmin* ([1882], 15 Cox Cr. Cas., 122, 124); Summing up of Stephen, J., in *R.* v. *Maybrick*; *The Times*, 8th August 1889.

Criminal Law Amendment Act 1885, it would become necessary for the judge to put crucial questions to the prisoner, and this would sap the prisoner's confidence in the absolute impartiality of the judge, which is so valuable a feature in our present system.[1]

While there remains the fact that Lord Campbell expresses a decided disapproval of Sir John Holt's practice of questioning a prisoner, it cannot be said that the former concluded that the putting of questions to the prisoner necessarily impaired the relations between the prisoner and the judge, as Lord Campbell recalls that Holt's conduct, in presiding at the trials of the conspirators in the assassination plot on William III, was applauded even by the Tories, and that Lord Preston acknowledged to the Chief Justice in open Court that he had had a fair trial for his life.[2] There also remains the fact, previously alluded to, that Hallam censures Holt's questioning of prisoners, and there were undoubtedly Jacobites who resented Holt's conduct of the State trials.[3]

The question of the right of a prisoner to make an unsworn statement was much discussed at the trial of Mrs. Maybrick for the murder of her husband by poisoning, Liverpool Assizes, 1889.[4] Stephen, J., in allowing the prisoner to make her statement, remarked that, on the one hand, it would not be under the sanction of an oath, and on the other, it would not be subject to cross-examination. The learned judge had some doubts as to whether the prisoner would be allowed to make a written statement,[5] and, according to *The Times*' report, the prisoner

[1] *See* Speech of Mr. Lyttelton in the debates on the Second Reading of the Criminal Evidence Bill in the House of Commons, April 25, 1898.

[2] *Lives of the Chief Justices*, Vol. II, ch. xxiii, pp. 413, 415.

[3] *Somer's Tracts*, 10,526; North's *Examen*, p. 411.

[4] See *The Times*, Aug. 1 to Aug. 8 inclusive, 1889.

[5] Before the Trials for Felony Act 1836, the accused frequently read written defences prepared by counsel. See Parl. Pap. 1836, and *Patch's*, and *Thurtell's and Hunt's Cases*.

could not have made a written statement.[1] It was also made an order of the Court that no one should communicate with the prisoner from the Saturday when permission was given for the statement to be made, till the Monday when it was to be made. In a further reference to the subject, Stephen, J., stated that the reason was that the statement must be the prisoner's own statement. Reference was also made in the summing-up to the resolution of the judges that it was not proper to allow the prisoner's counsel to make himself the prisoner's mouthpiece. The rule about counsel not being allowed to make statements which could not be proved by competent witnesses, has not been committed to writing,[2] but it was probably referred to in other words by Stephen, J., in the summing-up in the *Maybrick Case*; at a time when a prisoner could not give evidence, counsel for the defence may merely have been prohibited from making themselves the mouthpiece of prisoners, because the latter were in November 1881 not competent witnesses.

In the *Maybrick Case*, the unsworn statement of the prisoner was made after all the witnesses for the defence had given their evidence, and just before the final speeches for the defence and prosecution.[3] This procedure seems important in view of the eminence of Stephen, J., and the very considered manner in which the prisoner's statement was admitted by him; but it is submitted that it is at this day an exceptional procedure where witnesses are called for the defence. It has been ruled that if a prisoner is defended by counsel his statement must be made before counsel for

[1] A written statement was allowed in *R. v. Walking*, 8 C. & P. 243, by Gurney, B., after consultation with Alderson, B. See *Russell on Crimes*, Vol. 2, p. 2000 n. In *R. v. Blades*, Yorkshire Summ. Assizes, Leeds, August 2, 1880, Bowen, J., at the trial of an indictment for murder, allowed the accused, who was defended by counsel, to make a written statement before his counsel addressed the jury.

[2] *Best on Evidence*. Tenth Edition, p. 540 n.

[3] *The Times*, 6th Aug. 1889.

the prosecution sums up the evidence.[1] In *R.* v. *Shimmin* ([1882], 15 Cox, 122), Cave, J., stated that the rule which the judges intended to follow was, that a prisoner defended by counsel should make his statement at the conclusion of his counsel's speech; but this was not the course adopted at the trial of Mrs. Maybrick.

The result of the *Maybrick Case* furnishes an anticipated commendation of the policy of the Criminal Evidence Act 1898. At the trial of Mrs. Maybrick in 1889, Stephen, J., remarked in the summing-up, that the law which prevented a prisoner from being called as a witness was "a most unwise and most unhappy law."

It appears that the first occasion on which the right of an accused person to give evidence on oath in his own defence was agitated, was when the Legislature in 1836 was debating the advisability of permitting persons indicted for felony to make a full defence by counsel.

In giving evidence before the Royal Commission of 1836, Sir Frederick Pollock, A.-G. (afterwards Pollock, C.B.) described the cross-examination of a prisoner on oath as extremely dangerous, opposed to all the feelings and prejudices of the great majority of the nation, concluding—"I have no hesitation in saying that the power of cross-examining a prisoner would be very mischievous. Where a man is under an accusation of a grave offence, it is exceedingly difficult for him to conduct himself in a perfectly natural manner. Perfect calmness may enable guilt to assume the appearance of innocence, while terror and alarm may give to innocence the semblance of guilt."[2] But the practice of allowing a prisoner to give evidence has been considered on very high authority to bear directly on the

1. *Russell on Crimes*, Vol. II, p. 1999, referring to the ruling of Darling, J., in *R.* v. *Smith*, 20 Cox, 334. In this last case the prisoners called no witnesses, and did not give evidence.

2. Second Rep. Comm. Cr. Law, Parl. Pap. 1836; Cd. 343, p. 77.

necessity for an appeal on fact.[1] The two procedures are in *pari materia* as regards their purpose or object; and though Sir Frederick Pollock, A.-G., was opposed to an accused person giving evidence, he was, at that date, an advocate of appeal on fact in criminal cases, but he afterwards retracted his views as regards criminal appeal.[2]

The Earl of Halsbury, C., in moving the second reading of the Criminal Evidence Bill in the House of Lords, 10th March, 1898, stated that the principal ground for the Bill was that it was "impossible to imagine an innocent man charged with an offence who would not be most anxious to face his accusers and give his own account, submitting himself to cross-examination." A second material ground for the Bill was that for the last twenty years the Legislature had been steadily advancing in the direction of allowing a defendant in a criminal case to give evidence on his own behalf. Twenty years before, Lord Halsbury moved the second reading of the Criminal Evidence Bill in 1898, a similar Bill was read a second time in the House of Commons by a majority of 129, and in 1897, another measure was carried by a majority of 200 to 41. Measures proposing that a prisoner should be allowed to give evidence had been submitted to the House of Lords five or six times before 1898. Altogether, from the year 1872, to the end of the year 1897, some twenty-seven Acts were passed, varying slightly in their terms, rendering persons charged with specific offences competent witnesses.[3]

Best says twenty-five (sect. 622 (A), p. 515), but omits the Prevention of Cruelty to Children Act 1904. One of the two only cases that have gone to the House of Lords under sect. 1 (6) of the Criminal Appeal Act, arising on a

[1] Speech of Lord Alverstone, L. C. J., in the House of Lords on the Criminal Appeal Bill of 1906. *The Times*, May 23, 1906.

[2] Parl. Pap. 1836, Cd. 343, pp. 79, 81; Session 1847-8, Cd. 523, p. 59.

[3] *Taylor on Evid.*, 10th ed., p. 977 n, s. 1372 (A).

point under sub-sect. 1 of sect. 4 of the Criminal Evidence Act, finally decides in the negative the long-agitated question whether the husband or wife of the person charged is a compellable witness in the case of an offence against any enactment in the Schedule of the Act (*Leach's Case* [1912], Cr. App., R. 15). It is curious to note that apparently the husband will remain a compellable witness for the prosecution in the case where the wife is rendered liable to criminal proceedings under sect. 16 of the Married Women's Property Act 1882, which is an enactment in the Schedule of the Criminal Evidence Act 1898; by virtue of sect. 1 of the Married Women's Property Act 1884: an enactment which is not in the Schedule, but which is to be cited with the Married Women's Property Act 1882. The result is that an exception to the rule that a prisoner's wife or husband is a non-compellable witness for the prosecution still arises under the Married Women's Property Act 1882, sect. 16.

It is submitted that the examination of a bankrupt, which indubitably relates back to the time when bankruptcy was a crime, constitutes in principle a precedent for a defendant's giving evidence in criminal proceedings. A bankrupt is a compellable witness (Bankruptcy Act 1883, sect. 27 (2)), but the analogy appears fairly precise when it is remembered that a bankrupt is entitled to be protected against inculpatory questions in cross-examination as regards questions not touching his estate, in a similar manner as a defendant in criminal proceedings is conditionally protected against questions going to his credit under sect. 1 (F) of the Criminal Evidence Act 1898. Again, a bankrupt is not entitled to any protection against being required to answer questions touching his estate, though the answer would tend to criminate him,[1] and in this respect the cross-examination of a bankrupt precisely corresponds to that of a

[1] *Exp. Schofield re Firth*, 6 Ch. D. 230.

prisoner under sect. 1 (E) of the Criminal Evidence Act 1898, and the analogy acquires great historical consistency when it is recollected that in earlier times bankruptcy was a crime.[1]

The passing of the twenty-seven statutes referred to made the state of the law in 1898, preventing a person charged with an offence from giving evidence, "utterly indefensible."[2] Lord Ludlow observed that, "it would seem to depend upon what part of the body an assault is committed whether the accused can give evidence for himself or not." The Earl of Halsbury quoted from a communication of Sir Harry Poland, K.C., addressed to *The Times*,[3] with the view of meeting the objection that the proposed Bill made any new departure in the Criminal law, and to show "the absurd incongruities" of the state of the law, at the date of the second reading of the Criminal Evidence Bill. Sir Harry Poland observed: "It is impossible to allow the present anomalies to continue. I could fill a column of *The Times* with them. Let me state a few of them:—A man charged with an indecent assault on a female is a competent witness, but if he is charged with an indecent assault on a male he is not a competent witness. If he is charged with an act of indecency with intent to insult a female under the Vagrant Act, he is not a competent witness; if he is accused of gross indecency with another male under the statute, although not amounting to an assault, he is a competent witness. If a man is charged with forging a trade mark, he is a competent witness; he is not a competent witness when charged with any other forgery. Suppose the whole case depends upon whether the accused wrote a particular letter or document. If he is charged with libel, he can give evidence on his own behalf. But if he is charged with writing a threatening letter or with forgery, he cannot give evidence."

[1] *Per* the Earl of Halsbury, C., in *Clough* v. *Samuel* [1905], 12 Mans. 347, 348. [2] Speech of Lord Herschell. [3] Feb. 14, 1898, p. 5, col.

A third ground advanced by the Earl of Halsbury, C., for passing the Criminal Evidence Bill, was, a contingency to which the above anomalies lent themselves on the part of a vindictive prosecutor. The Lord Chancellor observed that, to use the striking phrase of Willes, J., a prosecutor may "ring the changes in the same matter of fact,"[1] and the anomalies existing in 1898 lent themselves to a design on the part of the prosecution to deliberately shut out the accused from giving evidence on his own behalf. In England anybody can prosecute anybody else for anything, and there are cases in which a prosecutor can select that particular form of charge which will exclude his antagonist from examination and cross-examination. Is it possible, the Lord Chancellor demanded, to defend such a state of the law? On the subject of the practical operation of the measure the Earl of Halsbury, C., proceeded: "Not so much perhaps in big cases, in which eminent counsel are engaged on both sides, and to which public attention is conspicuously drawn, but in other and less important cases, it is my firm conviction that not infrequently injustice is done by reason of the exclusion of the evidence of the person charged. Take the ordinary case that comes before the police magistrate every day in London. No one can speak more highly than I wish to of the way in which the police do their duty, but after all a policeman is mortal and sometimes loses his temper. He takes a person into custody and then, in a matter in which he himself has been a warm disputant, he tells his story, and then the magistrate is called upon to adjudicate on the case, because the other man cannot tell his story. Some people fancy that cross-examination is intended to confuse an honest witness. That is not my experience. Cross-examination is the asking of questions which may elicit and generally do elicit the real truth."[2] The Earl

[1] R. v. *Rearden* [1864], 4 F. & F. 76, 80.

[2] As to the subject of examining and cross-examining witnesses. *Taylor on* [illegible] Tenth Ed., s. 1428, p. 1032 n. *Best on Evid.*, Tenth Ed., p. 642, [illegible]; and see Baron Alderson's advice, *infra*.

of Halsbury proceeded:—"I may be asked for examples of the evil of which I have spoken; it is difficult to find examples without causing pain, but I have in my mind a rather remarkable case in which, if the defendants had been allowed to make a statement on oath, I am convinced no men of intelligence and experience would have convicted them. Can it be a satisfactory statement of the law when you can make an accusation against a person at your will, and when that person is not permitted to answer under cross-examination the allegation made against him?"

There can be no doubt that the Criminal Appeal Act 1898 has worked admirably in the cause of justice as far as police court cases are concerned, and has completely struck the balance between the accused and the police before the magistrate. Lord Alverstone, L.C.J., in his great speech on Lord Loreburn's Criminal Appeal Bill, remarked that "I go so far as to say that if an accused man will tell the truth at the early stages before the magistrate, so as to give time for inquiry, his ultimate conviction, if he is innocent, is almost an impossibility. I will not say an impossibility, because I do not wish to exaggerate."[1] The sequence of events in the *Beck Case* bears upon these observations of Lord Alverstone, L.C.J., as at his second trial, when, of course, he could have done so, Mr. Adolf Beck did not go into the witness box at the police Court. (Parl. Pap. 1904, Cd. 2315, p. 299.) It is impossible not to observe that the class of cases in which the application of the Act has given rise to both public and professional criticism are the very cases in which it was anticipated by the Lord Chancellor in 1898, that the remedial operation of the Act would be least conspicuous.

Some advice given by Sir William Garrow to Alderson, B., which the latter judge communicated to the Bar at Chester

[1] *Law Times*, June 23, 1906, p. 207.

Winter Assize, 1849, appears to have escaped notice in either the notes or the text of great repertories of the Law of Evidence like *Best* and *Taylor*. Baron Alderson observed, at the trial of an indictment for burglary, that when he first appeared at the Bar, "Sir William Garrow told me that no one ought ever to examine his witnesses and look at his brief at the same time. A counsel ought to know from his brief what a witness will say, and then look at the witness as he examines him, and arrange in his own mind, as the examination proceeds, the whole of the facts, so as to form a complete and connected narrative. That learned judge was the most exquisite examiner-in-chief that ever appeared at the Bar, and it is infinitely more useful to be a good examiner-in-chief than a good cross-examiner: the one is useful every day of the week, the other only occasionally." The learned Baron added:—"He defends a prisoner best who asks the fewest questions."[1]

On the subject of legal authority in favour of the Criminal Evidence Bill, the Earl of Halsbury remarked that—"I am not quite certain that, upon the mere question of authority among lawyers, I should be disposed to recommend so considerable a change in the law; but I cannot help saying that lawyers are not as a rule the most enthusiastic law reformers.[2] But in 1898, Lord Bramwell, the late and then present Chief Justices (Lord Coleridge, and Lord Russell of Killowen),[3] Lord Brampton, and Mr. Justice Wills, were all in favour of a prisoner being allowed to give evidence.

[1] See *The Times*. Advice to young Barristers; March 28, 1849, p. 7, col. f.

[2] See, on this subject, May, *Const. Hist. Engl.*, Vol. II, p. 263; where it is observed, that on the passing of Fox's Libel Act 1792, Lord Thurlow and five other lords signed a protest in the House of Lords predicting "the confusion and destruction of the Laws of England." (*Parl. Hist.*, xix, 404, 1534–1538. Campbell, *Lives of The Chancellors*, V, 346.)

[3] As there can be no doubt that Lord Alverstone, L.C.J., has approved the principle of the Criminal Evidence Act 1898, it follows that the principle of allowing a prisoner to give evidence has been approved by three successive Lord Chief Justices of England.

Mr. Russell Gurney, not only from his actual experience as a judge, but from his actual experience of the practice in the United States, came to the conclusion that the system of allowing accused persons to be examined was infinitely the better system for the purpose of eliciting the truth." It has been indicated that Lord Herschell appears to have recognised the necessity of passing the Criminal Evidence Bill. But Lord Herschell criticised as a great blot on our present system, that, before the evidence is concluded before the committing magistrate, the prisoner is told that he can make a statement, but every effort is made to prevent him. He is told that if he makes a statement it will be taken down and may be used as evidence against him upon his trial. Instead of being deterred from doing so, prisoners should be encouraged to make a statement, and that at the earliest opportunity." But apart from the fact that a prisoner cannot be asked any questions on his unsworn statement, while he may be cross-examined on his evidence, there is this additional difference, that while a person charged is to a certain extent deterred from making an unsworn statement, most judges invite the prisoner to give evidence, and Lord Alverstone, L.C.J., and Ridley, J., have stated in the Court of Criminal Appeal that they "always invite a person charged to give evidence on his own behalf."[1]

In his speech on the Criminal Evidence Bill 1898, Lord Herschell reiterated the recommendation of the Commission which reported on the Criminal Law in 1836, that "the prisoner's counsel should in all cases be entitled to the concluding address, and that the same practice in this respect should be extended to trials for misdemeanours."[2]

In the House of Commons, Sir Edward Carson and Mr. Lyttelton opposed the Criminal Evidence Bill, while Bucknill, K.C. (now Bucknill, J.), advocated it. The Second

[1] *Mark's Case* ([1908], 1 Cr. App. R. 132).

[2] *See* Rep. Comm. Cr. Law, *Parl. Pap.*, 1836, Cd. 343, p. 18.

Reading passed by a majority of 149—229 members voting for the measure.[1] In a correspondence in the *Law Journal* on May 6, 1911, the opinions of the most eminent lawyers of the day were collected on the subject of the working of the Criminal Evidence Act. There were five out of ten contributors who were altogether opposed to any amendment of the Act, while the remaining five advocated the repeal of the provision enabling the prosecution to mention the accused's previous conviction, if he attacks the character of the prosecutor or the witnesses for the prosecution. It is submitted that there is historical consistency in this view. The history of the subject of the mention of a previous conviction began in 1827, and the statutes of 1836 and 1851 conditionally enabled the prosecution to mention the accused's previous convictions only if he gave evidence of his good character. There was nothing in the Acts of 1836 or 1851 that corresponded to the alternative condition precedent in sect. (F) (ii) of the Criminal Evidence Act 1898, enabling the cross-examination of the accused as to his previous convictions if he attacks the character of the prosecutor. Sir Edward Carson, K.C., who, as has been noticed, opposed the Criminal Evidence Bill, argued that it would be far better that the prisoner should be subjected to the full extent of cross-examination, than that he should be put to the ordeal of steering his way so as not to suggest that the witnesses against him had bad characters, or that he himself had a good one. From another point of view, Lord Russell of Killowen, L.C.J., Sir E. Fry, and Sir Harry Poland, K.C., all arrived at the same conclusion, that the cross-examination of the accused should be unlimited.

It is submitted that this may be the better way of amending the Act. As the law stands at present, there [illegible]ably a theoretical liability for a trap to be set

[1] *The Times*, 26 April, 12 d.

for an unwary prisoner under sect. 1 (f). It is observed in Hawkins' *Pleas of the Crown*, that a plain and honest defence is always the best in a case of felony. But if this be true of the defence, how much more ought it to be true of the prosecution, not merely in practice, as it doubtless always is, but also in theory.

N. W. SIBLEY.

## IX.—EVIDENCE OF AN ACCUSED PERSON.

UNTIL quite recently it was a fundamental principle of British law that an accused person could not give evidence for or against himself. His plea of "not guilty" was held to be equivalent to a judicial denial of any accession to the crime. By degrees this rule was relaxed in certain statutory charges, and ultimately the Criminal Evidence Act 1898 made the accused person a competent witness for the defence at every stage of the proceedings.

More than a century ago Baron Hume, one of the ablest criminal lawyers whom Scotland has produced, declared in his *Commentaries on the Law of Scotland respecting Trials for Crime*, chap. 12, that reference to the prisoner's oath was incompetent, adding these words, "It appears to be repugnant to the whole tenor of our practice, which even in civil matters is actuated by a great fear of involving any one in the guilt of perjury, that a person should be placed in this hard and trying position, where conscience is at war with the strongest propensities of our nature."

In this hard and trying position a guilty man now stands when he is called to give evidence for himself. He must either commit perjury or convict himself. Few will expend sympathy on a guilty person in this dilemma, but an innocent man is in a plight little better. The Criminal Evidence Act indeed provides that no comment shall be made upon

the non-appearance of the accused person in the witness box, but every one knows that without comment the jury will place their own construction upon his failure to appear, and that their construction will be adverse to the prisoner. Sometimes the point is impressed upon the jury by a well-intentioned but injudicious judge, who directs them in his charge that they are not to allow themselves to be influenced by the circumstance that the prisoner has not chosen to give evidence in his own behalf. The innocent man therefore has two alternatives before him,—he must either run the risk of having an unfavourable construction placed upon his motives, or incur a still greater hazard by going into the witness box.

It seems a paradox to say that there is really less danger incurred by a guilty person in giving evidence in his own behalf, than by an innocent person, but a little reflection will show that this is the case. The guilty man is probably a cunning rogue, but even if he is not, he knows the facts of the occurrence, and consequently is aware of the pitfalls which lie in his way. He may therefore give the jury a very plausible account of his conduct.

The innocent man is in a different position. He does not know what really happened, and it is very improbable that he has clearly grasped the bearing of many of the facts proved by the prosecution. Now, it must be borne in mind that no man is tried for a crime unless there are some damaging pieces of evidence against him, which he has not been able to explain away. If he had been able to satisfy the prosecution on these points prior to the trial, he would not be in the dock. Yet if he could not give a satisfactory account of his conduct while he was waiting trial, is it likely that he will be able to do so in open Court before judge and jury, and under the pressure of cross-examination? It is almost certain that he will not. He is conscious of the damaging facts which stand against him, and in his

endeavour to put a better face upon them he will probably commit himself by false statements. It is further extremely likely that he can only clear himself of these facts by giving an explanation which would infer some moral turpitude of which he is ashamed. He will naturally seek to avoid such shameful admissions, and in so doing will involve himself in a mass of contradictions. In short, if counsel believes his client to be innocent, he may be better advised to leave him in the comparative security of the dock.

It must never be forgotten that if a person elects to go into the witness box and tell his own story, he will almost certainly be convicted if the jury believe that he is lying. An innocent man, conscious of certain incriminating facts which have been proved by the prosecution, and possibly aware of certain other facts which infer disgrace, although they may not imply guilt, is bound to be nervous and to tell his story badly. He will in fact appear to the jury to be a clumsy liar. It is well known that an innocent man when falsely charged, seldom behaves in the manner which is popularly associated with innocence. He usually hesitates, stammers, becomes flushed or pale, and exhibits what are regarded as unmistakeable signs of guilt. A cool scoundrel is better able to assume the appearance of innocence, than an innocent but indignant man.

Supposing, however, that the accused person is guilty and is trying to screen himself by telling lies, it has frequently been remarked that few men can lie gracefully. Unless he is a particularly accomplished liar, his appearance will have a bad effect upon the jury.

These points which are matter of everyday experience, show that counsel has to discharge a very delicate task when advising his client as to whether he should give evidence on his own behalf or not. On the whole, unless in very special circumstances, it is safer to restrain the accused person from giving evidence; but it would almost

seem that counsel may put his client into the witness-box with more confidence, if he suspects that he is guilty.

There are other serious considerations which counsel ought to weigh carefully before he advises one way or another. An accused person, who is guilty and goes into the witness box, frequently completes the case for the prosecution. There are generally certain facts connected with the occurrence which the prosecutor has been unable to ascertain. No one knows these facts except the accused, and in accounting for his movements he frequently supplies the missing information.

As an illustration of this, take the frequent case where there is no doubt that a man seen at a certain place committed the crime, but it is by no means clear that this man was the accused. In giving evidence, the accused is almost certain to connect himself with some fact, which in its turn connects and identifies him with the person seen on the spot, and so completes a missing link in the chain of evidence against him.

Again, a person in his eagerness to clear himself will deny facts which have been absolutely proved. The writer has seen numerous cases of this sort. On one occasion he was prosecuting a man on a charge of poisoning cattle by laying down white lead in a field. The case was circumstantial, and the main defence was that the accused had no opportunity of being on the spot where the white lead was laid down. The accused's attention was concentrated on explaining his movements in such a way as to show that he could not have been at the place, and in so doing he forgot that it had been proved that he had white lead in his house, and that a small quantity was found in a paper in his pocket when arrested. Consequently, when asked respecting his use of white lead he indignantly declared that he had *never used that substance*. There being no doubt as to the fact of his possessing white lead, his denial seriously injured his

defence, as it showed that his statements were absolutely unreliable.

Even where the accused, in giving evidence on his own behalf, does not actually complete the case for the prosecution, he not uncommonly establishes its probability. Supposing he is guilty, he must know that he was at the scene of the crime at the time of its commission, and also that the fact of his presence will tell heavily against him unless he can explain it away. Under such circumstances he not infrequently exercises his ingenuity in devising a plausible tale to account for his presence in a manner consistent with innocence. It may have happened that counsel for the defence has succeeded in shaking the witnesses as to identity, and a doubt on that point has crept into the minds of the jury. If left there, its effect on the jury might have led to a verdict of "not guilty." But when the accused goes into the witness box and admits he was at the scene of the crime, but proceeds to unfold his ingenious explanation, the jury are disgusted. They reject his tale, and accept the evidence of the witnesses for the prosecution, being the more ready to credit them on other points, because they find that they have nearly doubted their evidence as to a fact which the accused person has admitted.

Since the passing of the Act the writer has taken part in many criminal trials of one sort or another, and he cannot recall a single instance in which the accused by giving evidence on his own behalf derived any benefit which would not have come to him had he said nothing, and left counsel to give his explanation. On the contrary, he remembers numerous instances in which the evidence of the accused has damaged his defence. In the majority of cases the accused is neither better nor worse, except in so far as he has added perjury to his other offences, if he has deponed on oath that he was not guilty when he well knew that he was guilty. It were better that this should be avoided.

There are generally present at every trial persons who, if the accused was guilty, are aware of the fact. To these it cannot be an edifying sight, to see the man, whom they know to be guilty of the crime charged, step into the witness box and solemnly swear that he is innocent. When they further see that he is not prosecuted for his perjury, will their respect for the sanctity of an oath be increased? Will they not rather be encouraged to go and do likewise?

Of the ethical aspect of the subject we shall say nothing, seeing that we are at present concerned only with its legal aspect. The practical question is this: Does an accused person increase his chance of escaping conviction, if he gives evidence on his own behalf? On consideration of the points which have been mentioned, there appears to be reason for very much doubting the fact.

HENRY H. BROWN.

## X.—TRUSTS AND THE LAW.[1]

THE last chapter in the history of industrial development should be entitled "The Trust." As a force regulating the production of commodities, their transportation and their distribution, the Trust constitutes the last word. It represents the perfection of industrial organisation.

It is not possible to trace here the history of industry in its slow and painful progress from prehistoric times. In a word it is the history of the victory of the principle of co-operation over that of isolated individual effort. Mankind was slow in learning its lesson. Countless centuries separate the needle, laboriously fashioned by the cave-man out of a piece of ivory or bone, from the machine-made steel needle

[1] *Concentration and Control. A Solution of the Trust Problem in the United States.* By Prof. C. R. Van Hise. New York: The Macmillan Company. 1912.

turned out by the million in a modern factory, after undergoing a dozen or more processes at the hand of a dozen or more operatives. Of the various stages through which industry passed, before this principle of co-operation, which culminated in the modern industrial system, was recognised and applied, it is unnecessary to treat in detail. It must suffice to state that the Trust is the natural product of industrial evolution, and became possible only when the production of commodities was carried on under the factory system, transport highly developed, and communications quickened. At the same time, it must not be forgotten that without concentration of industrial concerns the development of transportation and communication would not have taken place so rapidly or to anything like the same extent. These forces are interdependent.

What then are the economic advantages of the concentration of industry? What is the economic value of manufacturing commodities with a large plant and doing business on a grand scale? Industries, of course, differ in character, and any general conclusion may require modification when tested by a particular case. Professor Van Hise, President of the University of Wisconsin, has summarised in his recently published work, *Concentration and Control*, the economic advantages of concentration of industry as "the sub-division of labour, the full use of mechanical appliances, the speciali-

number, or even of all the stages from the raw material to the finished article), utilisation of by-products, entrance into allied industries, distribution of plants of the same kind, using only the most efficient plants, maintenance of investigating departments, economies of business management and reduction of amount of capital."

These advantages are so great that they are not open to question. And they are so obvious that the public has

to the Trust in the United States, and to a lesser degree in this country, would be incomprehensible were it not for the fact that the object of the Trust is twofold. This object is not only the lessening of the cost of production, but the maintenance and enhancing of prices by the control of the market. This control can only be complete when the Trust has become a monopoly, and it is attained when production can be effectively limited.

The problem for solution is not whether the advantages of concentration outweigh the disadvantages or *vice versâ*, but whether the Trust cannot be retained free from the disadvantages. To destroy the Trust is to destroy the most efficient instrument of production the world has hitherto devised. It would throw back the industrial system into the chaotic competitive stage from which it has already largely emerged in the United States, and is in process of emerging in this country. In the former country the question has already reached an acute stage. It is a question of practical politics. There, the question has largely resolved itself into the alternative of the destruction of the Trust, regardless of its obvious economic advantages or of its control by legislation.

As it is in the United States that the Trust has attained its greatest development, and it is there that the most serious attempts are being made to control its operations by the Legislature, any discussion of the problem would be incomplete and inconclusive which omitted from its purview the history of the Trust in the United States.

The comparatively early appearance and unusually rapid growth of the Trust in the United States must be attributed to the effects of the Civil War. The combined forces of the North and South in the field at one time numbered more than a million and a-half troops; whilst in the North a great naval power was created. The small and isolated industrial concerns were incapable of supplying the materials and

munitions of war in sufficient quantities and in the required time demanded by the authorities. This demand was met by the large factory, which in turn gave tangible proof of the value of co-operation on a large scale. It was perceived that through the use of a multitude of men under one organisation a given big result might be reached at a definite time and place. Thus, as Professor Van Hise states, "One of the most far-reaching effects of the Civil War was the acceleration of concentration under the tremendous necessity to do things on a great scale."

Of other influences contributing to the acceleration of concentration in industry the most important may be mentioned. These are the joint stock company, the protective tariff, railway rebates and drawbacks, local underselling, patents and trade-marks, and manufacturers' rebates.

The first has rendered possible that enormous capitalisation which is the outstanding feature of the Trust. It has been somewhat hastily assumed in Free Trade circles in this country that Protection is responsible for the Trust. This, of course, is incorrect. What Protection really does is to eliminate one factor in competition, *viz.*, the foreign competitor, and also to enable the home producer to sell commodities as high as the tariff permits and the home markets will bear, and to dispose of his surplus in the foreign markets at a lower rate. The secret arrangements under which railway companies conceded rebates and drawbacks to the great industrial concerns, potent as they formerly were in the concentration of industry, have within recent years ceased to operate, and may therefore be dismissed from consideration. Local underselling is another powerful factor in promoting concentration, and has very largely prevailed in the United States. This immoral practice is not wholly unknown in our own country. The control of patents naturally favours concentration, and where a particular patent is essential to the manufacture

of a given article, a complete monopoly is created. For instance, the United Shoe Machinery Company controls all the patents used in the manufacture of machines necessary for the cheap manufacture of shoes. These machines the company refuses to sell; it merely hires out the machines to other manufacturers. By this method it is enabled to absorb or drive out all competitors. Finally, the practice of large manufacturers giving a rebate to buyers upon the list price at the end of a given period, provided they have purchased exclusively from them, has proved a highly-successful means of securing the market and maintaining or enhancing prices. This policy has been extensively followed by the American Tobacco Company.

As already stated, the object of concentration was two-fold. The one, the lowering of the cost of production: the other, the maintenance or enhancement of prices. But it was soon found that concentration of an industry, or a number of allied industries, in the hands of several independent groups, was impossible in practice. Under the keen competition which ensued, prices were cut so as to lessen profits to a minimum, and frequently to wipe them out altogether, or even convert them into a loss. Such a situation could only be saved by a combination of the groups in one large Trust. "Among the causes which have led to the formation of industrial combinations," reported the Industrial Commission in 1900, "competition, so common, so vigorous, that nearly all competing establishments were destroyed, is to be given first place."

In spite of popular faith in the efficacy of the law of competition, long regarded by Anglo-Saxon opinion as the bulwark of industrial liberty, competition has been eliminated in the great manufacturing industries. And although concentration has not yet gained predominance in transport and distribution, competition has largely broken down, and its complete elimination is only a

question of time. In the retail trade in the United States competition in prices for standard articles has ceased to exist between shops of the same class in the same community. In Great Britain, this process is even more marked, owing to the rapid development of the great stores and co-operative societies, whilst pooling arrangements between the railway companies have practically eliminated all effective competition and paved the way for ultimate and inevitable amalgamation.

Moreover, competition, invaluable as it undoubtedly was in a former stage of industrial development, is deservedly perishing because it has failed to secure for the consumer the control either of the quality or the price of commodities. Under modern conditions its effect has been, speaking generally, both to lower the quality and to cause greater distress by irregularities in prices.

To these disadvantages must be added the waste of the competitive system. And it is the consumer who ultimately has to pay all the losses and wastes, the cost of which is added to the price he pays for everything he buys. As Nettleton points out: "The waste of wealth due to unrestrained competition would, if saved, go far to enrich the community every year. And this waste finally falls for the most part on the general body of consumers—the much-enduring public."[1]

It is now recognised by leading economists and by the general body of traders and manufacturers, that unrestrained competition as an economic principle is too destructive to be permitted to exist. Under modern conditions, business men must either co-operate or perish. With this alternative before them, co-operation is inevitable. Moreover, it is in accordance with the natural evolution of industry. The result is that these men, conscious as they are that they are breaking the law, feel [illegible]

[1] *Trusts or Competition.* Cited by Professor Van Hise.

moral guilt. Combination is practically universal. Here and there an individual is selected for prosecution. But the deterrent force is very small. Like soldiers on the field of battle, all hope that the blow will fall elsewhere. With this general violation and sporadic enforcement of an impracticable law, respect for the law becomes blunted, not only in one respect, but generally. And this loss of respect is inevitably accompanied by loss of moral responsibility. Labour conditions in the United States are a striking illustration of this absence of the moral sense.

We must now proceed to examine the laws regulating industrial combinations. These laws have followed the same course of development as in Great Britain, where freedom to combine in trade to any extent, provided the combination were not immoral, unlawful or oppressive, were not contrary to public policy and were not a monopoly, had become legalised. This freedom to combine was as fully recognised as freedom to compete.

The limits of the combinations which were within the law in the United States prior to the anti-Trust legislation have been summarised as follows:—

(1) Any combination of corporations or individuals, the object of which is, or the necessary or natural consequence of the operation of which will be, the control of the market for a useful commodity, is against public policy and unlawful.

(2) Any combination of quasi-public corporations, the object of which is, or the necessary or natural consequence of the operation of which will be, the increase of charges beyond reasonable rates or the curtailment of facilities afforded the public, is against public policy and unlawful.

Under these principles, combinations which had for their object maintenance of a fair price, union of rival manufacturers, agreements in selling price or division of profits

and exclusive trade agreements, were deemed lawful. But whilst great liberality was shown to combinations and agreements in restraint of trade, when such agreements and combinations affected partnerships or corporations, they were declared to be illegal.

The first Trust case to come before the Courts was that of the *People* v. *The North Sugar Refining Company*.[1] Hitherto I have spoken of the Trust generally. Its technical meaning must be more closely defined. Under the Trust, each unit of the combination transferred its stock to trustees. The entire stock was thus held by a group of trustees who had complete authority over the business of all the companies forming the combination. Each unit, however, retained its own officers, who conducted the business as an independent concern, with this most important exception. In all matters affecting the line of product, amount of output, and price, they were subject to the direction of the trustees. The Trust was thus enabled to limit the output, to prevent competition in price so far as its own units were concerned, to apportion business, to consolidate buying and selling, and so gain all the advantages due to concentration of industry.

In dissolving the North Sugar Refining Company, which was a combination with the above definition, the Court held that the acts of the Trust were unlawful for two reasons: "1. They constitute the corporation a partner, and a corporation is not allowed by law to enter into partnership. 2. Any combination, the tendency of which is to prevent competition in its broad and general sense and to control and then at will enhance prices to the detriment of the public, is a legal monopoly and is against the public interest."

Upon similar grounds the Standard Oil Trust of Ohio shared the same fate, and numerous decisions followed which declared that combinations going to the extent of

[1] 121 N. Y. 582.

monopoly were contrary to public policy, as intending to control the market.

Notwithstanding these decisions, a large measure of liberty remained.

Suddenly, in 1890, a new policy severely restricting combinations was inaugurated by the Sherman anti-Trust law. Combinations hitherto regarded as legitimate were, by the Act, so far as inter-state commerce was concerned, declared illegal. Similar legislation regulating intra-state commerce followed in most of the States of the Union.

Sects. 1 and 3 of the Sherman Act make "every contract, combination in the form of a Trust or otherwise, or conspiracy in restraint of trade or commerce," illegal. This provision applies as among the several States and Territories, the district of Columbia and foreign countries; as between persons, corporations, and associations engaged in inter-state commerce; and as between one of any of these groups with any member of another group, except contracts between two foreign countries.

Sect. 2 provides that "every person who shall monopolise or attempt to monopolise, or combine or conspire with any other person or persons, to monopolise any part of trade or commerce among the several States or with foreign countries shall be deemed guilty of a misdemeanor." Thus the law forbids both restraint of trade and monoply or attempt at monopoly. Violation of any of the above provisions of the Act is made a misdemeanor, and is punishable by a fine not exceeding $5,000 or imprisonment not exceeding one year or both.

Sect. 7 provides that any person who is "injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act . . . . . shall recover threefold the damages by him sustained and the cost of suit, including reasonable attorney's fee."

Subsequent amendments have extended the inhibition of combinations to importers.

Under these statutes many cases came before the Courts. The earlier decisions were singularly ineffective. There were of course some exceptions. For instance, the Northern Securities Company was declared to be in restraint of trade. This was what is known as a "holding company." It possessed the whole or the bulk of the stock of several railways. This decision has raised the question of the legality of the great holding companies formed for the purpose of controlling the market in the shares of other companies or of controlling the businesses of other companies in the sole interests of the holding company.

In more recent years the Courts have gone still further in their attempts to restore the principle of competition, and in their interpretation of the provisions of the Sherman Act, have gone a long way to reintroduce the Common law relating to combinations and contracts in restraint of trade. The decisions declaring the Standard Oil Company and the American Tobacco Company illegal combinations were of a sweeping character. By these decisions both companies were reduced to their constituent units. The former was broken into thirty-eight companies, with separate officers or directors. The two hundred and fifty or so units of the tobacco combine were allowed to be reconstituted in fourteen companies, three of which possessed 70 per cent. of the original capital of the company.

The object of the Government was announced by President Taft to be to secure "a degree of disintegration by which competition between its parts shall be restored and preserved." How far is this object likely to be obtained? In the opinion of the Attorney-General these decisions will effectually prevent the recurrence of agreements which in the past have resulted in a monopolistic situation. The natural tendency of men to compete with one another

will," he declared, "operate, and the fact that there is community of stockholding cannot prevent that natural tendency."

But, as we have laboured to point out, the natural tendency of men to co-operate is much stronger than their tendency to compete. In spite of such disintegration as already described, the two companies are carrying on the same businesses as if nothing had occurred. The law may break the form, but it cannot kill the spirit. The attempt to destroy trade combinations has failed, as it was doomed from the first to failure. The Standard Oil Company has ceased to exist in name, and its business is now carried on by thirty-eight so-called independent companies; but does any one seriously believe that these companies are in any sense competitors? Trusts may be disintegrated by the law, "but in their places," as one writer declared, "you have associations for the betterment of trade, &c.; there are any number of dinner and luncheon clubs, and reunions, and general understandings, winks and telephone messages, that are far more difficult to get at."

That the law has failed is shown by the opinion of the market. Whilst the case of the Standard Oil Company was before the Courts, the stock fell to 585 dollars per share. After the decision it rose to 900. Similarly the stock of the American Tobacco Company fell to 390, only to rise, after its dissolution, to its highest point but one in the history of the Company, viz.:—529 dollars per share.

A further development of the Trust, designed to evade the provisions of the Sherman Act, is a combination known as "the complete merger." The stock of the constituent companies of the combination is bought in and cancelled, the shareholders receiving in exchange an equivalent amount of stock in the new combine. The great merger has already become the subject of attack in the Courts. The Diamond Match Company, for instance, which bought up competing

concerns in the manufacture of matches, has been declared an illegal monopoly in the State of Michigan. This attack on intra-state commerce will, no doubt, be extended to inter-state commerce. Whether such attacks will be any more successful remains to be seen. After twenty years of attempted suppression by legislation, the only effect has been to change the forms of combination. The informal agreement has given way to the pool; the pool to the trust; the trust to the holding corporation; the holding corporation to the complete merger. And during this process in the development of the larger industries, hundreds of informal associations of precisely the same kind have arisen, such as fruit growers' associations, butter makers' associations, &c.

It is true that many abuses of the combine have been stopped; many unfair practices have been eliminated. But the main object of this repressive legislation has failed. There has been no gain in preventing combinations in restraint of trade. The Sherman Act has proved impotent to destroy combination and co-operation, and it is clear that further attempts in the same direction will be equally futile.

Under these circumstances, what is the remedy? Admittedly concentration in industry has come to stay. It is the most perfect system of industrial organisation yet devised, and it is a natural development. To destroy it would be the height of folly, and yet to allow it to remain uncontrolled is impossible. It would prove a tyrant, compared with which the despots of old would appear but pale shadows.

The remedy advocated by Professor Van Hise and his school is public control. Already in the field of public utilities, such as transport and municipal services, public control has been obtained. During the last twenty years a sound development in the control of public utilities in the States of the Union has taken place. This course has been followed by the State Government, which, by the

Inter-state Commerce Act of 1887 and the Amending Acts of 1906 and 1910, have instituted a system of control for inter-state commerce, applying to all common carriers and public utilities. An Inter-state Commerce Commission has been created with powers to supervise all questions of rates and charges and services. Other commissions have been appointed to secure the proper quality of commodities in the interests of public health. Most of the States have instituted commissions or boards to deal with adulteration of foods, drinks and drugs. A pure food law was passed for inter-state commerce in 1906.

Upon the whole, the results of this system have proved so satisfactory that Professor Van Hise urges its extension to the big industries with a view to fixing prices. Regarding concentration as inevitable with its attendant high prices, he maintains that the only protection for the public is regulation by the State. Such regulation is, he conceives, best attained through commissions vested with authority to place maximum and minimum prices at reasonable levels. As Attorney-General Wickersham has stated: "If we permit the existence of organisations or combinations of producers under such conditions that they can fix prices, there is no means of securing justice to the consumer except through the Government asserting its right to step in and dictate prices, or, at least, to require that they shall not be raised above reasonable limits."

In Great Britain the Trust has already taken root, following the same line of natural development as in the United States. But hitherto the evils of the system have not been seriously felt.

In the first place, the doctrine has been fully accepted by the Legislature and by the Courts that freedom in trade gives freedom to combine as well as freedom to compete, provided the combination did not result in monopoly. Consequently, extensive combination and co-operation has grown up in

almost every line of industry in Great Britain. But not being driven from one position to another by prohibition of combination, the movement toward giant holding companies or mergers has not been so far-reaching as in the United States. Such combines as exist operate through co-operations and federations rather than through mergers, although in a number of cases consolidation has gone far; but there are few industries in which a single combination controls more than half the business. Secondly, the Trusts are unable to enhance prices to the same extent as in the United States and other protective countries owing to our Free Trade system. And thirdly, public utilities, services such as drainage, water, gas, electric light, tramways, baths and wash-houses, libraries, &c., have been municipalised. Telephones have lately been added to those services, such as the post office and telegraphs already administered by the State. The control over transport exercised by the Railway and Canal Commission has not proved so satisfactory as to lead to any demand for the extension of that system to other industries. But the institution of a minimum wage for miners may prove the commencement of the adoption of the system advocated by Professor Van Hise. In the case of transport, nationalisation of railways appears to be only a question of time. If the principle of co-partnership, which is advocated in influential quarters, should become popular, it would minimise the evils of concentration to some extent. But with the evolution of national Trusts to world Trusts, which has already commenced, we are confronted with a far more intricate problem. This would appear to necessitate an international commission for the purpose of controlling prices.

At the present moment, however, there is no immediate necessity to institute legislation in Great Britain for the control of the Trust, owing to our Free Trade system and our state and municipal ownership of public utilities.

But the time will come, and it may not be so far off as is commonly supposed, when the power of the Trust, national or cosmopolitan, will force itself upon public attention with no uncertain sound. The general situation has been summarised by Macrosty as follows:—

"The position of the British combinations in regard to the interests of the community may be summed up as not at present dangerous, but containing, like every new development, great and unknown possibilities alike for good and for evil. Over prices their powers are not great but are growing. So far they have shown no increased power over their employees, and with a strong trade union they need not have."[1]

Combinations which confine their operations to Great Britain are fully alive to the weakness of their position owing to the free admission of foreign competition. They are obviously at a great disadvantage compared with combinations in countries where their commodities are sheltered behind a tariff wall, since the excess products of foreign competitors can enter Great Britain without payment of duties, whereas British excess products cannot enter protected countries without scaling the wall. This situation has already resulted in the formation of a number of international combines centred in or conducting business in Great Britain. Of the more successful may be noted the Imperial Tobacco Company with a capital of £17,500,000, the limited Alkali Company with a capital of £8,200,000, W. Cory & Sons Coal Company with a capital of £2,800,000, J. & P. Coates Thread Company, The Nobel Dynamite Trust Company with a capital of £3,000,000, and the International Steel Rail Company.

One of the latest Continental combines is the "Union Continentale Commerciale des Glaceries." The main purpose of this scheme is to centralise in Brussels the com-

[1] *The Trust Movement in British Industry*, p. 342.

mercial services of all the continental plate-glassworks, and to form a "comptoir de vente" of the industry, in order to suppress all competition, not only in respect of prices and conditions of sale, but also as to conditions of packing and quality of plate glass. It consists already of 13 companies, of which 5 are Belgian, 1 Dutch, 3 French, 1 Austrian, and 3 German.[1] Should these operations be extended to Great Britain and an effective world monopoly established, it is obvious that our free trade system would prove no bar. Even if such a combine were declared illegal by English law. so far as the English unit of the combine was concerned, any such decision would be ineffective. As Professor Van Hise rightly maintains, "no law can suppress the gentleman's agreement, where there are no rules, no constitution, no contract, but common action is effected verbally and informally." Some of the most oppressive combinations have been of this character. Neither combination nor agitation should be driven underground. It is significant that the loudest complaints in Great Britain are raised not so much against the legally recognised amalgamations as against associations which have no existence in the eye of the law and work in secret. "To strike" says Macrosty, "at the methods adopted by combinations is not easy without at the same time repressing measures blamelessly adopted by the individual trader. Boycotting, dumping, selling at a loss to crush competition, maintaining prices at the highest level which the market permits—these are no monopoly of combinations, but are weapons in every-day use by manufacturers, merchants, and shopkeepers. It would be indeed an extraordinary thing to strike a competition in the name of competition."

To legislate in a panic, regardless of economic conditions due to natural developments, would be fatal. It cannot be stated too often or too emphatically, that these great

[1] *The Times*, Jan. 22, 1913.

amalgamations are the best instruments for production of commodities, their transportation and distribution, and for the supply of public services devised up to date. To attempt to break them up into their original units would be foolish, were it not in many cases impossible. "Crude methods of suppression," says Macrosty, "are always wrong, nor does it seem sensible to search among legal principles relevant to a different stage of industry for weapons to hamper and obstruct."

But if the time is not ripe for legislation, it is surely time for a close inquiry into the workings of industrial combinations in the United Kingdom. A Royal Commission would elicit evidence which would awaken public opinion to the magnitude of the evils, and the vital importance of discovering some effective method of protecting the interests of the consumer and the general public.

In the meantime, we shall be wise if we carefully note the march of events in the United States and on the Continent, taking full advantage of the lessons to be derived from a study of the economic conditions attending industrial concentrations in the United States and elsewhere, and of the attempts made by the Legislature to remedy the evils inseparable from that system under the economic conditions which now prevail.

JURIS CONSULTUS.

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## XI.—CURRENT NOTES ON INTERNATIONAL LAW.

### Neutral Consuls in War-Time.

THE alleged improper treatment—which ranged from manslaughter to isolation—of an Austrian consular officer by the Servian forces in Western Turkey, has formed the occasion of much strong language in the Press. This newspaper campaign appreciably embittered Austro-Servian

relations, and even the organs of countries which were not directly concerned appeared to entertain the impression that Austria would have good cause for complaint if her consul had in any way been interfered with. The truth is, that she would have had no cause at all for complaint. Unless some specially atrocious act had been committed on his person, contrary to the customs of war and the Hague Conventions—or unless a deliberate insult were intended—any inconvenience or suffering experienced by her consul could give the Austrian Empire no cause for complaint. Even had he been clothed with diplomatic functions, which a consul is not, other powers than that to which he was accredited would be under no obligations to accord him any special immunities. An ambassador has no privileges outside the country to which he is sent —unless perhaps on his passage thither and thence. Much less has a consul. Similar complaints were made of the refusal to allow foreign consuls at Adriatic seaports to communicate with their national warships in harbour. For these complaints there could equally exist no foundation. A military commander is plainly entitled to take what dispositions he pleases in the district under his authority; if he could not interdict communication between the shore and foreign warships, he might find himself in serious difficulties. And although foreign consuls duly recognised by the *exequatur* of the territorial power must be accorded the necessary facilities for carrying on the work of their office, no such obligation exists towards them on the part of the occupying forces when the territorial power has been evicted. The power to which these occupying forces belong knows nothing of them, and is not bound by any special duties towards them. They are frequently subjects of its enemy.

The position is not modified by the quasi-diplomatic position of consuls in certain countries such as Turkey

As we have seen, had they enjoyed the full character of ambassadors, it would not have entitled them to the privileges of ambassadors to Servia. Grotius and Bynkershoek lay this down explicitly, and so does Wicquefort. More recent critics incline to consider ambassadors entitled to an undisturbed *transit* through the territory of third parties. But no one asserts that an ambassador is to be allowed to remain in the territory of a third power, with the enjoyment of diplomatic privileges, including that of leaving when he feels inclined. The question of the treatment in war of the ambassadors at the enemy's court has not often arisen. For, except in the case of complete conquest, the court and the *corps diplomatique* do not often come under the direct power of the enemy. It arose in the Franco-Prussian war, when the U.S. Ambassador (Washburn) desired to send despatches out of Paris through the German lines, and was refused permission, in spite of the protests of the American Government.[1] It indirectly arises in the circumstances of the present war, because of this partial participation of a multitude of consuls in the ambassadorial character. It must, however, be concluded that this quasi-diplomatic status does not in this case improve their position. The invading power is not an Oriental State, but a civilised European country. Consuls in Servia are not, we apprehend, invested with any diplomatic character. Their diplomatic position is a practical necessity when a country such as Turkey is concerned. But its necessity falls to the ground in presence of a fully civilised invader; and the consular character alone remains effective. And that is a character which the invaders are under no obligation to recognise.

[1] For this illustration we are indebted to Prof Oppenheim (Int. Law, sect. 399), who nevertheless treats the question of the right of ambassadors as against invaders as an open one.

## Armistices.

The conclusion of an armistice is almost always surrounded with considerable difficulty, on account of the position of besieged forces belonging to one side or other. If they are relieved, they are better off than before: if they are not relieved, they are worse off. Armistices usually stipulate for the observance of the *status quo* during their currency, but besiegers ask nothing better. The suspension of arms under such a condition carries on their siege for them at a minimum of trouble to themselves. If the duration of the armistice is ascertained, it might be possible to allow a corresponding quantity of provisions to be taken in. But if it remains unknown, the only course would be to furnish rations from day to day: and this would involve so much communication between the besiegers and besieged, and the imparting of so much accurate information as to the resources and requirements of the garrison, that it cannot always be a practical possibility.

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Yet, if anything like equality of terms is to be observed, some measure of relief must be afforded. When one party to the negotiations, however, is in a position of marked superiority, it has sometimes been refused, and the war has virtually proceeded in these quarters, by the slow reduction of the resources of the besieged. Continuous pressure is thus exerted on the enemy. It was no doubt for this reason that the German forces before Paris, in November 1870, declined to make it a term of a proposed armistice that the city should be reprovisioned.[1]

It is of course open to the opposing party to say whether or not they will accept a suspension of hostilities on such terms.

[1] By the armistice which took place on the capitulation, revictualment was not to take place until the forts surrounding Paris had been put in the hands of the Germans.—(*Samwer*, Vol. 6, p. 629): 28 Jan., 1871.

Morin states that on the occasion of an armistice in 1774, between Turkey and Russia, provisions were admitted into blockaded ports, whilst in 1797, when Lazare Hoche had surrounded Mayence and Ehrenbreitstein, a weekly reprovisionment was allowed during a suspension of hostilities. On the occasion of the siege of Mantua in 1811, elaborate precautions were taken specifying the amounts of victuals to be taken in, and placing the periodical revictualments at intervals of ten days. So, in 1813, when Napoleon besieged Dantzig, Stettin and Cüstrin. Morin also observes that after Sadowa a revictualment was allowed *presque illimitée* in the case of a large town like Olmütz, but on a restricted scale for fortresses.[1] He attempts to found on these instances a general rule making revictualment imperative, and quotes Thiers as insisting to Bismarck on—"*ce grand principe des armistices, qui veut que chaque belligérent se trouve, au terme de la suspension des hostilités, dans la même situation qu'au commencement.*" . . . . Otherwise, he goes on, "an armistice would be enough to secure the reduction of the strongest fortress existing."

But it seems really to be a matter of bargaining. If the terms are hard, and invoke a progressive weakening of the position, it is for the other side to refuse them. There is no compulsion to make an armistice.

In the case of Adrianople, it was obviously impossible for Turkey to refuse them. The armistice is only local, and does not suspend the active operations of war in every quarter. So long as the Greek army remains actively engaged, all other considerations are of quite minor importance. A Power which agreed to negotiate without an entire suspension of arms would hardly be likely to insist on the relief of an individual town.

[1] This was not by the armistice concluded by Moltke (given in *Samwer*, IV, 319), but a confirmation by Bismarck of even date (26th July, 1886).

## Probate of Foreign Will.

Strictly speaking, the grant in *Surrey* v. *Perrin* (L. R. [1912], P. 233), was not one of probate, but of administration *cum testamento annexo*. The principle, however, appears to be the same. It has always been considered that a foreign grant is neither necessary nor sufficient to confer a title to the assets of the deceased locally situate in England.

In the present case, there were considerable assets (over £10,000) in England, and, whether the alleged will was a will or not (as to which there was some doubt), it was clearly proper that a grant of administration should be made in England to someone. The sisters of the deceased applied for such a grant, and the Probate Registrar declined to stay proceedings in their action. Sir S. Evans, however, made an order staying them until the result should be ascertained of an action which was pending in the Italian Courts of the deceased's domicile, for the determination of the question whether the will was valid or not. For, if the will was valid, administration would be granted to the residuary legatee, whilst otherwise it would be granted to the next-of-kin.

But in deferring to the Italian Courts the decision of validity, to the extent of awaiting their decision, the President appears to have gone too far. If the Courts of the Italian domicile had already pronounced for or against the validity of the will, no doubt the English Courts would follow that decision. But they need not wait for it. The further elements existed in the present case, that the alleged will was written in English, and was that of a former domiciled British subject who had married an Italian; besides which, all parties but three resided in England, and none in Italy. This weighed with the Court of Appeal, though it scarcely should have done so, as it is not the

business of the law to balance competing advantages, but to lay down broad principles. If the language and spirit of the document were English, the applicable law was admittedly Italian, and perhaps, on grounds of convenience, one tribunal was as suitable as the other to pronounce on its effect. On the broad ground of principle, that parties interested are entitled to have the administration of English assets committed to themselves or to somebody, under bond to the Court, the Court of Appeal were right in reversing the President and in refusing to stay the action brought by the next-of-kin against the residuary legatees. That this incidentally involved the determination of the validity of a will according to Italian law by an English tribunal, is a mere detail.

It is curious that the deceased was under the belief that she need not trouble much about her will, as her money would go in the same way if she died intestate, viz., to her brother. Of course, he would have shared with the sisters; in point of fact, he predeceased her, but left children in whose favour the legacy would be saved from lapse by the law of Italy—always supposing the will to be valid.

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If the action proceeds, surely the Italian "sequestrator," who is in the position of an administrator *ad litem* in the foreign proceedings, ought to be cited, and perhaps he would be the right person to administer. "Where the Court of the country of the domicile of the deceased makes a grant to a party . . . . I ought without further consideration to grant power to that person to administer the English assets." (*In re Hill*, L. R. [1870], 2 P. & M. 90, per Lord Penzance.) "It is a general rule, that when a person dies domiciled in a foreign country, and the Court of that country invests anybody, *no matter whom* (? therefore even a sequestrator), with the right to administer the estate, this [illegible] ought to follow the grant, simply because it is the

grant of a foreign Court, without investigating the grounds on which it was made, and without reference to the principles on which grants are made in this country." (*In re Smith*, 16 W. R. 1130, per Lord Truro.)

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## Domicile in India and Uganda.

Perhaps a mistake was committed by those responsible for framing the laws of Uganda, when they imitated the Indian Succession Act of 1870, and whilst adopting domicile as the criterion of the personal statute, allowed a new institution to be called "domicile" which is not domicile and is not even very like it. By chap. 51, sect. 11, a Uganda "domicile" may be acquired, in the teeth of the most evident intention shortly to leave Uganda, by the mere process of declaring and registering an intention to acquire it, provided that the declarant has resided there for a year. Now, first of all, few lay people know precisely what a "domicile" is. Few would think that it meant anything more than residence. Fewer could think that it involved serious consequences to adopt it. It evidently does not amount to "domicile" to declare, however officially, that one means to be domiciled. Evidently, therefore, the section introduces a new institution—equally evidently, it gives it a misleading name.

Secondly, it is left uncertain for what purposes this new institution, which may be termed "self-registration," is applicable. It is introduced in the course of a chapter which deals with Succession. But it is quite general in its terms. Is it applicable to Divorce, to Capacity for marital and other contracts, to Bankruptcy? Chap. 49, No. 15 of 1904, sect. 4, suggests the contrary: Prof. H. Rolin thinks there is no doubt that it is so applicable! The unfortunate section (like most ambitious legislation) raises more problems than it solves. It seems a little odd also, to find the doctrine of *renvoi* introduced by means of an "illustration": but

that again is the fault of the Indian Act, which the Uganda legislator has faithfully copied.

Thirdly, the question arises of the possibility of going behind the "declaration." Is it incontrovertible? or can it be proved *aliunde* that by "domicile" the declarant understood "residence," or that he did not understand the consequences of his declaration? or may it be shown that his intention was unreal, his declaration untrue? It will be obvious that the section leaves the door open to a good deal of dispute. Last, but most important, comes this consideration. It is of prime importance that the criterion of the personal statute throughout the Empire should be the same. It is less important that the status of a person should be certain in Uganda than that it should be the same in Uganda as in England.

## Infants' Change of Domicile.

India and Uganda are, however it would seem, right in denying to a minor all power to change domicile. Westlake, in his latest edition, concedes such a right, apparently on the analogy of parochial settlement cases. But there are weighty dicta to the contrary. In *Forbes* v. *Forbes* ([1854], Kay, 341), Lord Hatherley said categorically, laying down the conditions of domicile:—

> "3.—That the domicile of an infant cannot be changed by his own act."

In *Somerville* v. *Somerville* ([1801], 5 V. 750), Lord Alvanley had declared that, "it cannot be contended, nor do I think it was, that during the state of pupillage [the *de cujus*] could acquire any domicile of his own. I have no difficulty," he added, "in laying down, that no domicile can be acquired until the person is *sui juris*." Again, in *Jopp* v. *Wood* [(1865], 4 De G., J. & S. 625), Lord Justice Turner says:—"There could have been no change of the domicile before 1807 when the minority ceased." These seem conclusive.

### Protectorates.

Professor H. Rolin has published a French commentary on the Uganda laws, in which it is satisfactory to see that he controverts the official idea that these countries such as Malaya, Zanzibar, and Uganda, are really foreign. "The interference of the British Government is so constant, so direct . . . . . that in fact the power exercised is almost as extensive as that which exists in respect of a conquered territory incorporated in the British Dominions. When such extensive powers are assumed, it seems hard to trace any dividing line between "protectorate" and "possession." If the entire sovereignty is assumed, the territory is really incorporated among one's possessions." That is what the present writer has consistently maintained.[1] The fact that the Foreign Office disclaims the idea that these places are "British territory" ought not to blind the Courts to obvious facts, or to hinder them from extending to the population the character of British subjects.

TH. B.

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## XII.—NOTES ON RECENT CASES (ENGLISH).

IN allowing an appeal against a judgment of the Divisional Court, to the effect that there was no good consideration in an assignment by a wife to her husband, to whom she owed money, of possible damages she might recover in a pending action against a third person for libel, the decision of the Court of Appeal in *Glegg* v. *Bromley* (L. R. [1912], 3 K. B. 474), suggests some interesting points.

Leaving out of consideration cases of fraudulent preference, it is the privilege of a debtor to discharge his debts in any order that pleases him, or he may assign property as security for any selected debt if the assignment is [illegible]

[1] *Cf. L. M. & R.*, May, 1912, 334.

contrivance for his own benefit. And this privilege is not destroyed if his attempt is to prefer an existing creditor to another who may afterwards arise. Though an existing debt is not of itself alone a good consideration, a forbearance on the part of the creditor, or a further advance by him may, as showing an increase of forbearance, make the consideration good. Though a cause of action for a personal wrong cannot be assigned, an assignment of future damages in such an action is an assignment, not of the cause, but of the fruits of the action. Nor is it an assignment of future property, but of property defined by the source from which it comes; and though it arises in the future, nothing passes till it comes into present possession. For these reasons, and if further the assignee has no right to insist on the continuance of the action or to interfere in it, there can be no maintenance or champerty. Against such an assignee, where there is good consideration, a judgment creditor who has after the assignment obtained a garnishee order, cannot attach the damages, for he stands in the shoes of his debtor, and as the assignee cannot claim as beneficial owner, the judgment creditor has no standing.

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A floating dock is not, even in its pristine days, well suited to withstand the fury of the Bay of Biscay. But when the structure has served its purpose in a home port for eighteen years, its fitness for such a passage is further impaired, and a proposal therefore for a policy on it with a "seaworthiness admitted" clause should put the underwriters upon inquiry. Such a clause, Fletcher Moulton, L.J., said in *Cantiere Meccanico Brindisino* v. *Janson* (L. R. [1912], 3 K. B. 452), "signifies that no defence is to be raised on the ground that the structure was not fit to continue against the perils of the sea." And therefore, where there was no proof of misrepresentation or concealment

on the side of the insured plaintiff, and the insurers had, foregoing all inquiry, accepted the clause, it was inevitable that a claim under the policy should be decided in plaintiff's favour.

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A contention about the meaning to be affixed to the ordinary word "adjoining" seems an insufficient force to compel a written judgment from the Court of Appeal; but perhaps it is not remarkable that unanimity in the decision was not attained. For the importance, especially in real property and testamentary instruments, that in every legal document all descriptions should have a recognised meaning, have led to abundant authority for maintaining established interpretations. Vaughan-Williams, L.J., in *Cave* v. *Horsell* (L. R. [1912], 3 K. B. 633), enforces this view. But there is authority also, that, in construing words, the subject-matter must be looked at, and its scope and object as well. This view was adopted by the other members of the Court. The plain question for decision was whether a landlord, owning five shops numbered 2 to 6 in a row, who demises No. 4 under a covenant not "to let any of the adjoining shops belonging to him" for the purpose of a business of the same nature as that for which No. 4 was let, could admit a competitor to No. 6. As it is impossible to imagine that the intention of the parties was other than that the whole five houses were within the covenant, Fletcher Moulton, L.J., and Buckley, L.J., feeling "bound to bear in mind the surrounding circumstances, and then to construe the words as a whole," held that No. 6 was included in "any of the adjoining shops." In view of conflicting decisions, this case will probably be of importance. It is of importance also to note that the report of *Ind, Coope & Co.* v. *Hamblin* is much disparaged by the statement of Buckley, L.J., that his judgment therein is "altogether inaccurate in an essential particular," and to

note likewise that Fletcher Moulton, L.J., thinks that Lord Wensleydale's canon of construction in *Grey* v. *Pearson* "must be greatly modified, even if it applies at all."

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In *Baker* v. *Ingall* (L. R. [1912], 3 K. B. 106) the point to be decided was the apparently simple one: whether under an agreement by which a sum of money was paid out of trade union funds to the defendant, a member, for his benefit, with a condition that he should repay the sum in a certain event (which happened), was separable from a bond which in compliance with the condition he executed. If it was separable it could be enforced; but if it could not be disjoined, then a claim for repayment would fail because of sect. 4 of the Trade Union Act 1871. The chief point of interest is the conflict of opinion on the Bench. The Divisional Court and Kennedy, L.J., held that the two agreements could be severed, on the ground that the grant to the defendant was a conditional gift; that the society's claim for repayment was not "for the application of the funds of a trade union"; that the bond was the result, and not a part, of the original agreement; and that it is not sound law to say that a deed forms part of a recited document unless it is in terms so provided. The two other members of the Appeal Court held, on the contrary, that the deed was a term of the original agreement.

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As it is enacted by the Trade Disputes Act that no Court shall entertain an action against a trade union for any tortious act committed by or on behalf of it, the Court of Appeal have ordered the name of the defendants in *Vacher & Sons* v. *London Society of Compositors* (L. R. [1912], 3 K. B. 547) to be struck out under Order XXV, r. 4, on the principle that against them no reasonable ground of action was disclosed. The ground of action alleged against

the defendants was, that they had sent circulars to some of the plaintiffs' customers requesting that orders of those customers should be given to such firms only in the same way of business as the plaintiffs as were printed in an enclosed list prepared by the defendants; and from this list the plaintiffs' name was excluded. A further act also alleged, was that to a committee, customers of the plaintiffs, threats had been written by the defendants to impede the committee's business if the request to restrict orders to the firms named in the list were disregarded. Farwell, L.J., who dissented from the Court's decision, held that as the defendants claim a licence, without responsibility, to injure their neighbours "and to inflict losses and misery on all or any of His Majesty's subjects," the licence should be interpreted as applying only when the acts were done in contemplation of a trade dispute, as it was extravagant to suppose that the Legislature extended immunity in other cases. Kennedy, L.J., however, with great intrepidity, declined to speculate on the policy of the Legislature. It may be noted, however, that his interpretation, reconciling the sub-sects. 1 and 2 of sect. 4 of the Act, carries with it some probability.

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The considered judgment in *Doleman & Sons* v. *Ossett Corporation* (L. R. [1912], 3 K. B. 257), is an appendage of the resolute principle that the Courts will not allow their jurisdiction to be ousted by private agreement. The effect of the decision of the Court below would, if it had not been reversed, have been extraordinary and quite subversive of dignity. For under it, where an arbitrator delivered an award while an action was before the Court on the same subject, the award would have decided the rights of the contending parties to the displacement of the subsequent judgment of the Court. And a scramble for priority of decision would have been the frequent result.

Of course, a provision in a contract that a breach, or the amount of damage of a breach, shall be decided by arbitration before a right of action arises, is untouched; so also is the right of a defendant under sect. 4 of the Arbitration Act to apply for a stay of action. But an essential accompaniment of this latter right is that he should make prompt application. And failing this promptitude, or on the refusal of his request, the decision of the Court is paramount.

T. J. B

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The case of *Solomon* v. *Attenborough* (L. R. [1912], 1 Ch. 451) has now been heard by the House of Lords. The decision is not yet reported, but, judging from the *Times* statement, the decision of the Court of Appeal has been affirmed precisely on the ground on which we said it might be sustained, namely, that the executors might be taken to have assented to the legacy, and were therefore in possession of the plate, not as executors but as trustees. (See *Law Magazine*, Vol. XXXVII, p. 340.)

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It may just be noted that in *In re de Sommery* (*Countess*) (L. R. [1912], 2 Ch. 622) Parker, J., has just held that where a specific legacy of foreign assets was made upon trust, and the executors made trustees of the will, acts done by the executors for the purpose of realising the property must be taken to be done by them as trustees, and the expenses arising out of such acts must be paid not out of the testator's residuary estate but out of the specific legacy.

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Just as *Thompson* v. *Dibden* (L. R. [1912], A. C. 533) was the case which attracted most public attention in the last batch of Reports, so *Bowles* v. *Bank of England* (L. R. [1913], 1 Ch. 57) is the one which attracted most public attention in the present Reports. And yet, like *Thompson* v. *Dibden*,

*Bowles* v. *Bank of England* is, from a legal point of view, of trifling importance. All that Parker, J., decided was that a resolution of the House of Commons has not the force of law. Probably no lawyer ever seriously thought it had, except where--as is the case with regard to customs--a special Act of Parliament gives it this effect. Technically then, the bank had no right to deduct income tax from dividends payable through it on the strength of the resolution fixing the rate of income tax. Yet it is very desirable that income tax should be so deducted. It cannot be in the end for the benefit of the income taxpayer that more expense than is absolutely necessary should be incurred in collecting the income tax, since all such expenses must be paid by the taxpayer. Accordingly the only result of Mr. Bowles' action will be an Act of Parliament making deduction legal, and an advertisement for what it is worth for Mr. Bowles.

Judicial discretion has become the bugbear of all lawyers. Where it exists, there the advising lawyer "don't know where he are." All he can say is that how it will be exercised will depend upon the judge before whom the matter comes. He is accordingly thankful to any judge who lays down rules as to its exercise as did Cozens-Hardy, M.R., in *Hyman* v. *Rose* (L. R. [1911], 2 K. B. 234), and laments openly when a higher Court disregards such rules and proclaims that the discretion of the Court cannot be so trammelled, as happened in that case when it went to the House of Lords (L. R. [1912], A. C. 623, at page 631).

This conferring of wide discretions on the Court is not confined to England. It is so easy a way out for legislators unable to draft that it would be strange if it were. Thus, in the very opening paragraphs of the new Swiss *Code Civil*,

which came into operation in 1912, the Court is directed, where a matter arises to which none of its provisions or of the local laws apply, to decide it as "a good legislator." It used to be maintained by Bentham and his followers that uncertain law was worse than bad law which was certain. And it does seem rather hard on the subject to compel him to obey law which the legislator is unable or unwilling to promulgate.

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In *Hyman* v. *Rose* (*supra*), the decision of the Court of Appeal was reversed, and the salutary principle was established that the alteration of premises demised in such a way as to render them suitable for the purposes of the lessee, when such alteration is not expressly forbidden by covenant, is not illegal; and if the lessee provides for their restoration to their original state at the determination of the lease, the Court will not restrain him from so altering them.

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In *Lloyd* v. *Grace, Smith & Co.* (L. R. [1912], A. C. 716), the House of Lords again reversed the Court of Appeal, and again established a salutary principle, namely, that when an employee commits fraud in the ordinary course of his employment the employer is responsible for it, even though it was not committed for his benefit. Why an employer should be held liable for his employees' lack of skill or care and not responsible for his lack of honesty, was one of the things which, in the words of the late Lord Dundreary, "no fellah could understand." Lord Macnaghten's luminous judgment has now put an end to it.

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In *Deeley* v. *Lloyds Bank Limited* (L. R. [1912], A. C. 756), the House of Lords again reversed the Court of Appeal. Whether the principle that case established is salutary or not may be open to doubt; but as to its correctness in law

there can be no question. There a banker held, as security for a customer's overdraft, a mortgage of his premises. The customer effected a second mortgage in favour of another creditor who gave the bank notice of his charge. Instead of commencing a new account with their mortgagee, the bank continued the old one, and the mortgagee paid in from time to time enough to discharge the whole overdraft. Afterwards he drew out of the bank to the extent allowed under the security. As there was no express arrangement, the House held that the rule in *Clayton's Case* ([1816], 1 Mer. 572) applied, and the payments in must be taken as discharging the overdraft existing when they were paid in. The decision is one all bankers should be wise to remember.

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In *Attorney-General* v. *Birmingham, Tame and Rea District Drainage Board* (L. R. [1912], A. C. 788), the House of Lords have agreed with the Court of Appeal that the Court has jurisdiction to discharge an injunction rightly granted by the Court below where the improper works enjoined have, since the grant, been set right. It held, however, that the jurisdiction should be exercised only when security was given that the works should not be allowed to become improper in the future.

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In *Hoare* v. *Kingsbury Urban Council* (L. R. [1912], 2 Ch. 452), Neville, J., held that sect. 154 of the Public Health Act 1875 (which directs that all contracts with public authorities for over £50 in value must be made by deed) is imperative, and therefore, unlike contracts merely within the Statute of Frauds, cannot be taken out of the operation of the Act by part performance. It would be more interesting to have an express decision whether a contract which can only be made by deed can ever be within the [illegible]

of part performance. Where the contract can only be made by deed there is no contract to enforce till the deed is executed. In cases coming within the Statute of Frauds the writing is not the contract but merely the legal evidence of the contract.

J. A. S.

## SCOTCH CASES.

In *Charlton & Bagshaw* v. *Thomas Law & Co.* ([1912], 2 S. L. T. 459) shipowners were sued for damage to cargo alleged to be due to the unseaworthiness of the ship. The defence was that, granted unseaworthiness, this was due to a latent defect, and, that being so, there was no room for a claim of damage, for the bill of lading under which the goods were carried exempted the shipowner from damage due to latent defect, and provided that latent defect should not be considered unseaworthiness unless resulting from want of due diligence on the part of owners or managers. But in the bill of lading was also incorporated the Australian Carriage of Goods Act of 1904, which declared to be illegal all contracts whereby the owner's obligation to keep the ship seaworthy was lessened, weakened or avoided. The Court held that, notwithstanding the reference to this statute, the clause exempting latent defect was valid, and could be pleaded in defence to the claim. This is quite in line with the decisions on the Harter Act, which find that that statute does not strike at stipulations in bills of lading to the effect that latent defects in hull and tackle shall not be deemed unseaworthiness.

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There have recently been reported three very important decisions on Workmen's Compensation. In all three the question was whether there was reasonable evidence

on which the finding of the arbiter could be supported; but in deciding this several matters of principle were discussed. In *Euman* v. *Dalziel & Co.* ([1912], S. L. T. 465) the question was raised whether death was due to accident or natural causes. The case merits special notice in respect of the remarks of the judges as to medical evidence, and particularly the observations of the Lord President as to the duties of an arbiter in deciding questions of fact arising on medical evidence, as to the proper form of stating the result of that evidence in a stated case, and as to the proof required to connect the death with the accident. In *Burns* v. *Summerlee Iron Co.* ([1912], 2 S. L. T. 469) we have an illustration of the principle that is now becoming quite fixed in this branch of the law, that mere disobedience to an order will not take a man out of the scope of his employment, yet if he arrogates to himself duties which he was neither engaged nor entitled to perform, then he is out of the scope of his employment. Finally, *Lendrum* v. *The Ayr Steam Shipping Co.* ([1912], S. L. T. 430) is yet another of those cases in which a person in employment was found dead and there was no one present to give direct evidence as to how the death came about, thus leaving for discussion the difficult question whether the circumstantial evidence established that the death arose out of the employment. In the case mentioned, the sheriff as arbiter found in favour of the deceased's representatives: but the Second Division on appeal held that the proof was not sufficiently conclusive to justify such a finding. The general result of this case is to still more firmly emphasise the principle that the pursuer in such cases is, as regards sufficiency of proof, in no different position from any other litigant. He must prove his case. He is not entitled to succeed on likelihoods or deductions made from data insufficient to bring conviction to the mind [illegible] the situation is obscure, then he cannot succeed.

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An arrangement was entered into between a limited company and a bank whereby the bank agreed to surrender certain moveables which they held in security of the company's debt to them in consideration of the company undertaking that they would procure a debenture or floating charge over the whole assets of an English company which was indebted to them, and that, as soon as they procured it, they would assign it to the bank in security for their debt. The company duly received from the English company a debenture for £17,000 in their favour, secured over the assets of the English company, but, before they assigned it, went into liquidation. In the liquidation the bank claimed that they were entitled to have the debenture assigned to them, arguing, that the moment the company obtained possession of the debenture they held it in trust for the bank, and the liquidator could not take advantage of the company's failure to implement their duty as trustees. The Court, affirming the judgment of Lord Cullen, held—in *Bank of Scotland* v. *Liquidators of Hutchinson Main & Co. Ld.* ([1912], 2 S. L. T. 416) —that at the date of the liquidation the debenture was the property of the company, and the bank had no right to it, but only a right to enforce the contract by which the company was bound to assign it to them. This was merely a contractual obligation, and the relation between the bank and the company was that of creditor and debtor, and not fiduciary.

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The House of Lords' decision in *Corporation of Edinburgh* v. *The British Linen Bank* ([1912], 2 S. L. T. 310) is chiefly noticeable for the remarks of the Lord Chancellor as to the position in law of a stock holder. Stock had been created by the municipality "redeemable at par after the expiration of a period of thirty years" from a fixed date. The Court of Session held, that at the end of thirty years the Corporation was bound to redeem. The House of Lords has

reversed and found that redemption is only optional on the Corporation. The whole point of the case was, What did "redeemable" mean? The Court of Session proceeded on the assumption that the issue of the stock by the Corporation was borrowing, and that consequently the relation between them and holders of the stock was that of debtor and creditor, which necessarily imported an obligation of repayment. But in the opinion of the Lord Chancellor, the raising of money does not necessarily lead to the relation of debtor and creditor. The selling and buying of such stock as that in question did not establish that relationship, but merely implied a repurchase of the stock at the option of the Corporation.

D. M.

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## IRISH CASES.

One case in which the Court may give leave to issue a writ for service out of the jurisdiction, is where the action is concerned with a contract made within the jurisdiction. Ordinarily, of course, the place in which a contract is "made" is the place where the offer is accepted. *O'Leary v. Law Integrity Insurance Co.* ([1912], 1 Ir. R. 479), shows that there may be an exceptional case in which the acceptance is not to be binding until something further has been done by the offeror; and in such a case the place where the contract is made is the place where this further thing is done. The action was brought to set aside an insurance policy as being *ultra vires*, and for the return of premiums paid. The defendant company had its registered office in Liverpool. The plaintiff had signed, in Dublin, a proposal for a policy, and had handed it to the company's Dublin agent, with the amount of the first weekly premium. The proposal contained a declaration by the plaintiff that the conditions of issue printed on the policy, immediately

the delivery thereof should be read by him, and should alone form the basis of the contract between the company and himself. The proposal having been forwarded to Liverpool, the policy was executed by the company at its head office there, and delivered by its agent to the plaintiff in Dublin. It contained conditions as to the payment of premiums, days of grace, revival, lapse, and other matters. The Court held that this contract was made in Dublin, on the ground that the policy, though executed in Liverpool, was not to be binding until delivered to the proposer.

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The question whether an accident arises "out of and in the course of" an employment, so as to give rise to a claim under the Workmen's Compensation Act, was apparently intended to be a question of fact; but the tale of decisions upon it shows no sign of ceasing. In *Greene* v. *Shaw* ([1912], 2 Ir. R. 430), the Court of Appeal have laid down a rule which has at least the merit of good sense, although its application to the facts of these cases may not be much more easy than that of the numerous other rules that have already been laid down. An accident, they say, does not "arise out of" an employment unless it is caused by a risk peculiar to that particular employment, and not common, at least in an equal degree, to the general public. Here a man was employed as a herd to look after cattle on two farms. On one of the farms he lived, and he was starting for the other farm, some quarter of a mile away, when his dog collided with the bicycle and knocked him down, causing injuries from which he died. The Court was unable to hold that the risk of such an accident as this was a special risk of his employment. Members of the general public who possess both a bicycle and a dog cannot be said to be in any less danger of these two objects coming into contact than is a herd who may use both for the purposes of his business.

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*Conlan* v. *Carlow County Council* ([1912], 2 Ir. R. 535), is noteworthy as making a choice between two inconsistent English decisions. The question is whether an assignment of *part* of a debt can be an assignment within the Judicature Act. *Skipper & Tucker* v. *Holloway & Heward* (L. R. [1910], 2 K. B. 630) had decided that it could, while Bray, J., in *Forster* v. *Baker* ([1910], 2 K. B. 636), had held that it could not. A Divisional Court now concurs with the latter decision. But, it is added, an assignee of part of a debt may maintain a common-law action in respect of such part, when all persons interested in the debt or in resisting it are parties to the action.

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In *Power* v. *Power* ([1912], 1 Ir. R. 511), we have a rather curious case of an appointment, which would in itself have been good, failing because it was made clearly dependent upon another appointment which was bad. A testatrix had a power to appoint among her children. She purported to appoint to a non-object for life, and after his death to other non-objects; and in case none of the said persons should live to take the property, then she gave it to one of the children. Two of the non-objects survived the testatrix. It was held that the ultimate limitation, though it was to an object of the power, was dependent on the former void appointments, and therefore failed.

J. S. B.

# Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

*A General Survey of Events, Sources, Persons and Movements in Continental Legal History.* London. John Murray. 1912.

Comparative law has become of late years of such interest that an organised investigation of it seems to have been undertaken in the United States, and the Bar Association there have a special "bureau" employed in its study. This probably is the inspiration of the present volume, which is limited to a General Survey of the subject. But a general survey of such an undetermined matter requires learning as wide and exact, as later volumes of closer detail can demand. The countries now brought within the compass of research are England, France, Germany and Italy, as representing the nationalities in which the foundations and principles of law have been most acutely sought for and most securely established. But Spain, the Netherlands, Switzerland and Scandinavia, in which the primitive period lingered more than in the principal nations, are brought under investigation. The plan adopted has been to select a typical work of one of the most eminent jurists in each country, and to translate it through competent experts into English. The translation of a work on law, from its dawn to the present day, needs much more than a scholarly knowledge of the two languages concerned. But that the work has been allotted to competent hands is evident from the many notes supplied, of explanation, of quotation from collateral sources, and of authorities on which deductions are founded. When the project is completed, the result will form a valuable section of a comprehensive law library.

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*The Annual County Courts Practice 1913.* By his Honour Judge SMYLY, K.C., and W. J. BROOKS. London: Sweet & Maxwell. 1913.

The volume for 1913 of this excellent annual continues its established order of treatment by giving minute and clear definitions of the jurisdiction of the County Courts, of the procedure before and after trial of cases submitted to their decision, and of the duties of all the officials with whom a litigant may be brought

into relation. The first part of the volume applies these matters to the Acts by which the County Courts are regulated and to the other Acts brought directly within the authority of the Courts, such as those affecting Bills of Exchange, Employers' Liability, and Workmen's Compensation. And it furnishes likewise the intricate Rules, and outlines of the very numerous forms, which are required under all these subjects. The second part (following page 1414 of the first) is concerned with the jurisdiction and practice under Acts other than those mentioned above, such as those which impose exceptional duties upon the judges, or in which they have exclusive jurisdiction or jurisdiction concurrent with that of the High Court. And in all these the fulness of treatment which is a feature of the first part is maintained. There are several useful Tables, such as that at page 698, showing the sections of the County Court Act 1888 which replace the sections of the Acts repealed by it. The Editors believe that all new decisions relating to the jurisdiction and practice are incorporated, and the probability of this may well be inferred from the fact that Rules made under sect. 2 of the Finance Act 1912 are included. And these Rules bear the recent date of December 18th 1912.

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*Local Government 1911—1912.* By A. MACMORRAN, K.C., and K. M. MACMORRAN, M.A., LL.B. London: Butterworth & Co. 1912.

This makes the third year of this series, which should be of great importance to local authorities and other kindred bodies. The period covered is from January 1st 1911 to September 1st 1912, and during that time two Statutes of far-reaching import have been passed. The National Insurance Act 1911 (1 & 2 Geo. V, c. 55) has revolutionised the position of employer and employed. The Shops Act 1911 (1 & 2 Geo. V, c. 54) has introduced additional burdens upon local authorities and shopkeepers, that of arriving at the true interpretation of the Act being *no means* the least. Government Departments have been prolific in issuing publications dealing with "Old Age Pensions," "Poor Law Relief," "Schools," etc. All this mass of information has been digested and assimilated under respective headings. Every subject has been brought up to date without interfering with the scheme of arrangement adopted in the past. All of these matters tend to make the volume a fund of useful practical information, instructive, and easy of reference.

*A Digest of the Law, Practice, and Procedure relating to Indictable Offences.* By ARTHUR DENMAN, M.A., F.S.A. London: Sweet & Maxwell. 1912.

This book which is otherwise entitled "Archbold Abridged" is, as Mr. Denman remarks in his Preface, "a Dictionary in a modified form" of that well-known authority Archbold. Without an *Archbold* it would be on many matters quite insufficient, but it will save the owner an immense amount of time and trouble unless he is exceptionally familiar with the "parent work." The work being composed by an experienced and capable Clerk of Assize deals with most questions, rather more from his point of view than that of an advocate, although its usefulness to the latter is not to be gainsaid. To the Judge, of whatever class, we think it will be very serviceable, in spite of a passage of somewhat suspicious humility in the Preface. It will be most useful probably to officers of Courts of less experience than the Author, who will find advice and information given them on many points not touched on in any other book that we know of. A particularly useful summary is that of Verdict of Lesser Offence. Some of the information given, does, however, seem to us superfluous, such as the question whether the Judge's Marshal should listen to discussions between the Judge and the Officer of the Court, and whether it is becoming for the shorthand writer to wear a black coat.

*National Insurance.* By J. H. WATTS. London: Stevens & Sons. 1912.

Mr. Watts has studied this complicated Act with great care and produced a very elaborate and complete edition. It is rather curious to note how the 625 pages that it covers, including the Index, are taken up. There is a lengthy and exhaustive introduction which fills up 70 pages. The Act itself, with abundant notes, takes about 200 pages, and the rest of the book, or no less than 350 pages, is entirely devoted to Schedules and Appendices, mostly the latter. These are also annotated. Two very useful Appendices contain the Unemployment Insurance Regulations, 1912, and an illustrative collection of the decisions of the Umpire appointed under the Unemployment Insurance (Umpire) Regulations 1912. Although Mr. Watts does his best, which is a great deal, to explain the provisions of the Act, the task sometimes seems a little too hard for him. One example is that of Rates in case of low wages,

"where the rate of remuneration does not exceed *1s. 6d.* a working day." Here he has to confess that "This clause will undoubtedly give rise to much discussion and uncertainty, and the Courts will have to give decisions." We should have liked a little explanation of the curious definition of "continuous unemployment," but Mr. Watts has not given any. Some of his criticisms of the drafting of the Act are rather unfavourable, such as that on sect. 96, which is— "The section is so badly drafted, it is so ambiguous, and contains so many points of difficulty and doubt, that it is certain to give rise to much trouble." Mr. Watts thinks, and in our opinion rightly, that contributions to the unemployment fund cannot be raised under sect. 93 more than one penny in all, that is one half penny each from the employer and workman respectively, but we have seen in another work on the Act that the learned Author construed this proviso as meaning that the rate of contribution could not be raised more than one penny per workman from the employer and one penny from the workman. Those who have not followed with attention the dispute between the doctors and Mr. Lloyd George would do well to look at the temperate and carefully worded contribution to the subject in the Introduction.

*Legal Decisions upon the Medical and Dentists Acts.* By C. J. S. HARPER. London: Constable & Co. 1912.

It seems that fifteen years ago there was prepared for the private use of members of the General Medical Council a volume of reports of disciplinary cases decided in the higher Courts. That was a small volume. Since its issue, some fifty other cases have been submitted to the judgment of the superior Courts of the United Kingdom; and in the present volume these, with the cases comprised in the private issue, have been brought together, and the work made accessible to the public. The case of *Hill* v. *Clifford*, reported at length, is a very interesting one. In the Appendix to the book the sections of the Medical Acts of 1858, 1859 and 1886, and of the Dentists Act 1878, with which any of the decisions are concerned, are set out in full. This publication, prepared by the Solicitor to the Council, not only meets a want hitherto unsupplied, but is complete in itself.

*Elementary Principles of the Roman Private Law.* By W. W. BUCKLAND, M.A. Cambridge University Press. 1912.

This is a scholarly and thoughtful treatise on the inexhaustible subject of Roman law. Though nothing so sensational as the

discovery in the last century of the text of Gaius in a palimpsest can now be looked for, yet incessant research reveals, even in that ancient subject, many points of fresh interest, such, for example, as the betrayal, partly, as the Author mentions, through a determinative pronoun in the feminine being applied to *pignus*, of the fact that the text was originally written of *fiducia*. The pages on *bonorum possessio* are very elucidatory; and so are those on *pignus*. It is too often the case that the rules under which a great people lived in "the grandeur that was Rome" are neglected and half forgotten when the strenuous life of the Bar is entered upon. But the practitioner who wishes to revive his learning, and the student who is preparing for examination, either at the Bar or the University, will find in this a ready and valuable help.

*Workmen's Compensation Appeals.* By C. Y. C. Dawbarn, M.A. London: Sweet & Maxwell. 1912.

Out of the multitude of cases which come up every year for decision under these Acts, so many raise new and difficult points, such, for instance, as whether certain fishermen are shore hands or ordinary servants, that this lesser number can be preserved from becoming a real wilderness of single instances only by an ordered and periodical arrangement. This volume contains no less than 141 of such special cases, though it is concerned only with the legal years 1910–11 and 1911–12, and the book is the more useful from its giving from the Author's notes taken in Court cases not yet reported. The Author anticipates that many cases will yet arise out of the recent one of *Payne* v. *Fortescue*, under sect. 1 (3) of the Act, which assigns to arbitration the settlement of any question as to whether a claimant is a workman or as to the amount and duration of compensation to be given.

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*The Yearly County Court Practice 1913.* 2 Vols. By His Honour Judge Woodfall and E. H. Tindal Atkinson. London: Butterworth & Co. 1913.

It is seventeen years since this well-known publication was established, and the issue for the present year is continued under the able Editors who have prepared several previous issues. Even in its origin the work was based on a matured form of *Archbolds' Practice*, and each edition was probably an improvement on its predecessor; so that from its firm foundation and from the watchfulness with

which this foundation has been strengthened and from year to year built upon, a structure has grown up which is not likely to present a weak point to any test. The volumes set out the County Court Acts and the Rules down to those recently issued, and explain the full practice under these and under the other Acts which deal with subjects coming within the jurisdiction of the district courts. Forms to meet the requirements at every stage of procedure are supplied, and there are inserted also a number of tables expressly designed to afford rapid enlightenment to a searcher in difficulty. The work is of course up to date, so much so indeed that the provisions of the Finance Act of last year relating to the adjustment in certain cases of the burden of licence duties is inserted, although the Rules under which, in default of agreement, terms are to be settled are not yet issued by the authorities.

**Second Edition.** *Hawkins's Concise Treatise on the Construction of Wills.* By C. P. SANGER. London: Sweet & Maxwell. 1912.

With a sense of difficult labour surmounted, Mr. F. W. Hawkins, in his first Preface, spoke of "the vast mass of reported cases on testamentary construction." His arduous task was to extract from this oppressive material the vital principles immured in its bewildering abundance; and this, with clear discernment, he accomplished, and, in moderate dimensions as he designed, embodied them with severe precision in a series of rules "necessary to be known for purposes of construction." The ability with which he drew out their principles has been recognised by a generation of lawyers, and has again and again obtained the commendation of the Bench. At the time of his death, it seems that he was collecting details for a second edition. These details have passed to the present Editor, and he, with knowledge and skill worthy of the original text, has added cases since decided, and so brought the work to the level of to-day. The treatise deals only with rules of construction, not with rules of law, but within its range there is no book that can with more confidence be consulted.

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**Third Edition.** *The Law relating to Workmen's Compensation.* By C. M. KNOWLES, LL.B. London: Stevens & Sons. 1912.

It will be many years, if the time ever becomes ripe for it, before the Workmen's Compensation Act, with the legion of decisions on subtle differences which it has demanded, can be cast into code

But in this book an experimental and partial advance to that final position has been made by stating in the form of propositions some of the principles which have been tested, and perhaps settled, by the judgments delivered on them. A good many additions to the compass of the preceding volume have been required in the present one: the Anglo-French Convention, for instance, and the National Insurance Act, and of course the Rules and Orders of 1912. The work has evidently required prolonged and careful preparation, and the volume is necessarily one of bulk, but this is owing not to verbiage in the treatment, but to the abundant litigation under the Act. The notes are condensed and explicit, and the work may confidently be employed as a manual.

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**Third Edition.** *Ryde on Rating.* By WALTER C. RYDE, K.C. London: Butterworth & Co. 1912.

This work, with its pleasing alliterative title, long ago established its position on its difficult and important subject. Difficult and important it is now, and it promises to become more difficult and important still, both on account of the new objects of rating which the development of modern industrial conditions have created, and also from the fact that even elaborate decisions of the House of Lords leave many questions unsettled, sometimes even among those that they profess to settle This will be at once evident to the reader who peruses Mr. Ryde's comments and criticisms on two very important recent decisions of the House of Lords, namely, *Great Central Railway Co.* v. *Banbury Union*, dealing with the rating of railways, and *Kirby* v. *Hunslet Union* with the rating of buildings containing machinery. Both of these decisions will lead to many appeals, and Mr. Ryde states that the decision in the latter case is in some parts of England systematically ignored by the Rating Authorities. All who know Mr. Ryde's work can rely on the edition having been thoroughly revised and all the new cases carefully summarised. If to any of our readers the summaries may appear too full or the citations too long, they should remember that the book is intended for use in many places where, to use the Author's words in the Preface to the first edition, "it is difficult, if not impossible, to have access to a law library, and it is intended for the use of many persons whose law library, even if accessible, is not well furnished." An interesting and important part of the Preface is where some suggestions are made as to what the law ought to be.

The first suggestion is that there is urgent need of codification of the practice. The illustration given of the Acts that an appellant (outside the Metropolis) must consult to know to whom notice of appeal must be given, and what length of notice is necessary, conclusively proves this point. Another amendment suggested that there should be "a real and effective" appeal from the decision of Quarter Sessions, instead of that poor substitute, a special case, when you can get it stated. Mr. Ryde also contends that there should be a right of appeal against a provisional list. He also gives a number of valuable suggestions as to the form of any Act to codify, or to amend the existing law. Two of these to which we should wish particularly to call attention are, that such Act "should be made complete in itself without requiring to be supplemented by rules," and that "the legislature should repeal—and should never re-enact—all provisions enabling the Local Government Board or any other Government Department to make Orders such as may be made under sect. 33 of the Local Government Act 1894. Perhaps the most important for every-day practice is the power, which Mr. Ryde suggests should be given to all Courts, to extend the time for doing acts, etc. A useful Appendix has been added, suggested and compiled by Mr. E. M. Konstam, showing the authorities which appoint the assessment committees for the several parishes in the Metropolis.

**Fourth Edition.** *Hill's Law relating to Electric Lighting, Power and Traction.* By W. E. TYLDESLEY JONES. London: Butterworth & Co. 1913.

The present edition of this standard work has been so entirely re-written and re-cast, that it almost constitutes a new work. Ten years have elapsed since the appearance of the third edition, with the result that the innovations are almost too numerous for notice within the purview of a short review. This branch of law has become of enormous importance having regard to the immense capital invested, in fact, the figures given in the Preface almost take one's breath away. The Reports of the two Joint Committees presided over by Lord Cross in 1893 and 1898 have been inserted, the importance of which may be gauged by the fact that effect was given to the recommendations of the latter report by the Electric Lighting Act 1909 (9 Edw. VII, c. 34). The text is divided into two Parts. The first Part contains the "Law relating to Electric Lighting and Power," the second Part, the "Law relating to Electric Traction." Power

Acts have increased enormously, and to some extent a stock form is being utilised. The learned Author has gathered his information from many sources. Officials of the Board of Trade, Messrs. Booth, Collins & Thomas, have helped him with experience of both branches of his subject. *The Electrician* is a widely read newspaper of high standing, and Mr. Jones owes much to the Publishers for not only lending him back files for reference, but for allowing him to use cases reported only in this paper and other technical journals. There is not the slightest doubt that the present edition bears the imprint of wide experience and great technical knowledge, in fact, everything has been done to maintain the high standard reached by former editions.

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**Fourth Edition.** *International Courts of Arbitration.* By T. W. BALCH. Philadelphia: Allen, Lane & Scott. 1912.

Readers of the *Law Magazine and Review* whose file goes back to 1874, will find in the November number for that year a long and interesting article on "International Courts of Arbitration" by the late Mr. Thos. Balch. A sumptuous reprint of this now lies before us. Unlike the reprints for which we are indebted to the enterprise of public organisations and societies, the present volume is produced by private munificence, and is edited by the son of the Author, Mr. T. Willing Balch. Mr. T. W. Balch also supplies a short Introduction giving the principal details of the Author's public life: and he has made additions to the monograph from an annotated copy in his possession. These include the notes of an interview with Lincoln towards the close of the Civil War, unpublished letters of Richard Cobden's, and lithographic facsimiles of two of Mr. Balch's letters to the press. The importance of the monograph lies in the fact that Mr. Balch, as early as 1864, pressed upon Lincoln the idea of an Arbitration to settle the Alabama question. Lincoln "thought it an amiable idea, but not possible just now, as the millennium is still a long way off." And, in London, Mr. Balch "found no one to treat it otherwise than as a conceit of a weak-minded enthusiast, except Mr. Cobden." Returning to the United States, his reception was even less encouraging—some people called him an (adjectival) "Britisher"! It was through Horace Greely and the *New York Tribune* that he obtained a hearing for the scheme, and he ascribes the greatest influence in its furtherance to a lecture by Prof. Lorimer. The *Tribune* letter (May 13, 1865), is printed in facsimile: it urges

succinctly that "the most successful war would after all be a most expensive and unsatisfactory process of litigation; and that the civilized and Christian way would be by arbitration." It would certainly seem that Mr. Balch is entitled to a much more conspicuous place in the memory of publicists, and especially of pacificists, than he occupies at present.

One of Cobden's letters makes interesting reading. Referring to the campaign initiated by some American statesman led by Mr. Stevens, to "fix the price of gold," he remarks—"When he has succeeded, I shall pray him to come here to regulate the weather and put down the East wind!"

**Seventh Edition.** *Seton's Judgments and Orders.* 3 Vols. By A. R. INGPEN, K.C., with F. T. BLOXAM and H. G. GARRETT. London: Stevens & Sons. 1912.

In this new edition the Editor has had to encounter the formidable task, requiring infinite care, of bringing the forms down to date, expunging such as had become obsolete, and sorting into strict order the marginal notes. Besides this, he has had to incorporate all that was necessary of the numerous Acts passed since the last edition, and to supply to them the requisite explanatory notes. All cases to the end of July have been noted. And even the Acts of 1911, passed while the work was going through the press, have, as far as possible, been dealt with. In the numerous as well as intricate subjects which are allotted to Chancery, there is assurance of safety in standing upon the ancient ways, and, on the other side, a probability of peril in straying from them. This unique collection of precedents, long settled and well understood, afford, in such circumstances, a miscellany of inestimable value to a practitioner who adheres to the models supplied. The utility of these tested and approved forms is extended by the fact that the Judicature Acts gave to every branch of the Supreme Court equal jurisdiction to pronounce judgments and issue Orders and Rules, for, in consequence, the precedents have become more widely applicable. Some special features, separate from the application of the forms, are presented throughout the volumes, such for instance as the list of Equity Judges, from 1660 to the present time. Information derived from this has been found useful in Court. In Chapter XXXVI, on Appeals, the effect of sect. 12 of the Judicature Act 1875 is considered in some very useful notes. The general Index also has

undergone a careful revision. The work altogether is "prodigious," not in extent of pages only (though these number over 3,300), and not only in the appropriateness of the vast number of examples cited, but in the scrupulous care with which the great undertaking has been edited.

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**Eleventh Edition.** *Company Precedents.* By Sir FRANCIS BEAUFORT PALMER. Part II, Winding-up; Part III, Debentures. London: Stevens & Sons. 1912.

Sir Francis Palmer's invaluable treatise on the Law relating to Companies has been divided, for practical purposes, into three Parts or volumes. Part I dealt with the everyday life of a company. We now have Part II, which deals with all matters necessary for an attendance at its last sickness and final obsequies. This volume is divided into three sections: section I gives us information as to a "Winding-up by the Court," section II treats with "Voluntary Winding-up," and section III deals with "Winding-up under Supervision." There are five Appendices: (A) Statutes, (B) Rules and Orders, (C) Practice directions, (D) Miscellaneous matters, (E) Tables of corresponding sections and rules. When it is mentioned that the text comprises some eight hundred and ninety three forms, many of which have not been printed elsewhere, it will be obvious that no pains have been spared to make this treatise comprehensive and up to date. Mr. Edward Manson has assisted the learned Author with the preparation of this edition.

Part III deals with Debentures, nowadays a most important branch of Company Law, especially when we learn that it has been estimated that £500,000,000 is now invested in that class of security. In the Preface the learned Author has sketched out a brief history of the development of Debentures from the time when a fresh impetus was given by reason of the decision in *In re Panama &c. Co.* (1870), 5 Ch. 318), down to the present time. In 89 chapters this difficult subject is elucidated in a masterly and comprehensive manner. The forms comprised are of the greatest practical utility. Messrs. Edward Manson and Robert Morris have assisted Sir Francis Palmer in the preparation of this volume.

In both cases due acknowledgment is given to outside and amateur criticism and information, to which there is no doubt that the writers of legal works owe much. Both volumes are up to that high standard

of knowledge and industry which any reader of a legal treatise bearing the name of Sir Francis Palmer is entitled to expect and invariably finds.

**Thirteenth Edition.** *Anson's Principles of the English Law of Contract.* By M. L. GWYER, M.A., B.C.L. Oxford: The Clarendon Press. 1912.

The popularity of *Anson on Contract* may be gauged by the fact that the last new edition appeared in 1910. Half-way between Leake and Pollock, it is pre-eminently a book for beginners and students, although its usefulness does not end there. One notices some slight changes in the present edition. The chapters are numbered consecutively throughout the whole volume in place of commencing fresh in each Part as before. Contract and Quasi-Contract is now dignified as Part VII, Chapter XXI, instead of being a no man's child as before. Dischage of Contract by Breach (Part V, Chapter XIV) has been very considerably re-arranged and re-written, a manifest improvement on former editions. Part II, Chapter VI, which deals with Mistake and Innocent Misrepresentation, has come in for considerable re-modelling, which makes for additional symmetry. Apparently, Sir William Anson still continues to exercise a benevolent supervision, although again Mr. Gwyer is the Editor. This amalgamation of forces brings about most happy results, and leads one to believe that *Anson on Contract* will maintain its position as a scholarly as well as a practical production.

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**Nineteenth Edition.** *Woodfall's Law of Landlord and Tenant.* By W. H. AGGS, M.A., LL.M. London: Sweet & Maxwell. 1912.

The first edition of this standard work was brought out in 1802, entirely remodelled in 1830, and seven editions were brought out by that well-known legal writer, the late J. M. Lely, so that now it may be said to occupy the position of a legal classic. Mr. Aggs was responsible for the eighteenth edition which he has now thoroughly overhauled and brought up to date in the present one. Since the publication of the last edition, there has been considerable change both in case law and statute law. *Markham* v. *Paget* (L. R. [1908], 1 Ch. 697) was a review of the authorities upon the question as to the covenant for quiet enjoyment that can be implied from any given words of letting. The learned Author appears to think Power

of that decision, considerable doubt still remains. In *Rose* v. *Hyman* (L. R. [1911], 2 K. B. 234) the Master of the Rolls laid down certain general principles as governing forfeiture, but in the House of Lords it was held, that no such rules could be usefully laid down fettering the discretion of the Court. The Court of Appeal considered the question of a tenant's obligations under repairing covenants in a lease of old premises in the case of *Lurcott* v. *Wakely* (L. R. [1911], 1 K. B. 905). This decision appears to have shaken the judgment given in *Lister* v. *Lane* (L. R. [1893], 2 Q. B. 212). Three important new statutes have been passed: the Agricultural Holdings Act 1908 (8 Edw. VII, c. 28), the Small Holdings and Allotments Act 1908 (8 Edw. VII, c. 36), and the Law of Distress Amendment Act 1908 (8 Edw. VII, c. 53). The last mentioned Act largely extended the principle of the Lodgers Goods Protection Act 1871 (34 & 35 Vict., c. 79) and gave the law in that respect less rigidity and a larger application. Of course it considerably diminishes the security the landlord possesses for the recovery of his rent and gives certain opportunity for fraud, but at the same time the Act will prove a great boon to a large portion of the community. A minor improvement in the present edition is that the date when each case was decided is given. There is no doubt whatever that the work "put in" by Mr. Aggs is stamped with thoroughness, and under his able editorship *Woodfall* will retain the high position it holds in legal literature.

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**Twenty-third Edition.** *Paterson's Licensing Acts.* By G. R. Hill, M.A. London: Butterworth & Co. 1913.

Though this work is nearly entitled to the claim of an Ancient, and though many of its notes, having maintained their integrity in edition after edition, have now almost the authority of decisions, it has not yet attained the stage of absolute repose, for the far-extending Finance Acts, the Shops Act of last year, and many other alliances of the subject have called for incorporation in the text. It is somewhat surprising to find that, in a subject which has a quite modern sound, the statutes referred to go back for the long period of 550 years. Some very useful features of the book are, the Summary of Licensing Acts from 1828 to 1906, the chapter on Appeals at page 96, and the chapters on Clubs and on Rating. Altogether, the work forms a complete and practical treatise on whatever concerns licensing.

*The Inns of Court and of Chancery.* Six lectures delivered in the Middle Temple Hall. London: Macmillan & Co. 1912.—These lectures will be of high interest to every member of the four Inns, at home, in India, and in the Dominions across the sea where wearers of the gown administer law. Delivered as they were by men of distinction, with especial knowledge of the subject and with access to archives outside public reach, the lectures bind together more information than half-a-hundred books would yield. Seldom is such value furnished at so slight a cost.

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*The Law of Evidence as administered in British India.* By MAHIM CHANDRA SARKAR, Rai Bahadur. Calcutta: M. G. Sarkar & Sons. 1913.—The Author has evidently bestowed infinite pains in the preparation of this work. It follows the usual form of commentaries on Acts of Parliament, by setting out the sections of the Indian Evidence Act 1872 and illustrating them by notes. To strengthen his conclusions he has consulted the text-books of a great number of English and American writers, and refers to a large number of law reports of both countries as well as of India. The work is a proof of great painstaking care and of a desire to make the book a useful guide to those who have to practise in the Indian Courts, and at the hands of these it deserves a great success.

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*The Copyright Act 1911.* By S. P. KERR. London: Jordan & Sons. 1912.—By sect. 31 of the Act nobody is entitled to copyright otherwise than in accordance with the terms of the Act; so that the irreconcilable decisions of early days by which this class of property was held, first to be a Common law right, and then later to have no protection outside the statute of Anne, need not, except chiefly for historical purposes, be now closely consulted. But though many difficulties are thus removed, the Act needs very careful noting, and as it now includes, besides literature, matters such as architectural works and mechanical contrivances, and extends to the Colonies, liable only to modifications by the Dominion legislatures, a book on a subject of increasing range, carefully edited as this seems to be, makes a convenient work of reference.

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*The Law of Extraordinary Traffic on Highways.* By B. [illegible] London: Sweet & Maxwell. 1912.—Though at Common [illegible] use of a highway for purposes to which it was not [illegible]

amount to nuisance, the remedies for misuse were, until the passing of the Highway and Locomotive Acts, difficult of enforcement. But the difficulty is diminished by the powers of the new legislation; and this book, in a well-considered division of the Statutes, explains what traffic and what expenses of road repair are extraordinary, and the conditions under which the claim of a highway authority can be prosecuted. In the Index the Author prints the names of two or three leading cases in special type which is valuable to the searcher, as readily catching his eye.

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*The Law of Libel as affecting Newspapers and Journalists.* By W. V. BALL, M.A. London: Stevens & Sons. 1912.—This is a print of five lectures delivered by the Author at the Institute of Journalists, and as neither the editor of a newspaper nor a writer therein possesses, as yet, the privilege of uncurbed disparagement free of cost, the work directs attention to points where a little restraint or vagueness is prudent. Many befitting illustrations are given. *Flanders* v. *Forrester*, reported in *The Times* of 31st January, 1912, for instance, is contrasted with the peculiar case of *Jones* v. *Hulton*. The short chapter "on the case for words" is good, and the book throughout is a practical one on that part of detraction to which it is devoted.

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*The Bread Acts.* By J. F. ROWE, LL.B., and F. J. MAW, LL.B. London: Office of the *Baker and Confectioner*. 1912.—This is written chiefly for inspectors of weights and measures and for master bakers, but it would be useful to anyone professionally engaged in bread cases.

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*Pitman's Law of Evidence.* By W. N. HIBBERT, LL.D. London: Pitman & Sons.—From the position of Dr. Hibbert as a professor of law at King's College, and from his extensive practice in preparing pupils for examinations, this book may be safely regarded as a useful guide.

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*Pitman's Law of Repairs.* By J. C. WORSFOLD, M.A., LL.D. London: Pitman & Sons.—A book to remove from the mind of a tenant doubts as to what repairs about his house fall upon him and what upon his landlord, cannot fail to appeal to a large number of persons who are sometimes perplexed by such a question.

*Cambridge Law Tripos Papers (1907 to 1911).* Cambridge University Press. 1912.—This collection will be of great use not only to men going in for the Tripos, but to those who are preparing for the Bar.

*Butterworths' Workmen's Compensation Cases.* Vol. V (new series). By His Honour Judge RUEGG, K.C., and DOUGLAS KNOCKER. London: Butterworth & Co. 1912.—This continuation of the new series of these cases is a report of those decided during the year ended October 1912, in the House of Lords and the Court of Appeal in England, and of a few selected from the judgments in the Court of Appeal in Ireland and the Court of Sessions in Scotland. These reports together fill 700 pages, and the spacious stretch of the legislation on this subject is well indicated by the fact that the present volume makes, with those of the earlier series, the fourteenth. The compilation is much more convenient for reference than the widely distributed cases in the regular reports, besides having the advantage of presenting between the same covers the included Scotch and Irish decisions. In all the English reports, indeed, it might have been more helpful if the workmen's cases had been printed on a separate division of each volume. For the present publication, the cases have been specially reported by members of the Bar, and they are no doubt precise and complete.

*Railway Consignment Notes.* By B. O. BIRCHAM. London: Butterworth & Co. 1912.—This is a most useful little handbook and will be of great benefit to lawyer and layman alike. The many persons connected with the carriage of goods and animals on railways should insure a wide sale, when its merits become generally known. The information is imparted through the medium of language so plain and uninvolved, that any person without the slightest claim to legal knowledge should readily understand it. It will be seen by a glance at the contents, that within the compass of some hundred odd pages, information is given upon a variety of subjects which crop up in every-day life. If this is, as we gather, the first book that Mr. Bircham has written, his success should tempt him to persevere in some more ambitious work.

**Second Edition.** *The Law of Copyright.* By L. C. F. OLDFIELD, M.A., F.C.S. London: Butterworth & Co. 1912.—A new edition of this work was needed, not only because copyright exists now

solely under the Act, but because the first one was brought out before the Act came into operation, and when no Rules and Regulations under it were ready. These important adjuncts were not issued by the Board of Trade till June 1912, but, being now included, make this one of the earliest complete treatises on the new law. Beside these Rules and the full Act, with notes, the work contains the 1909 Copyright Act of the United States, the Australian Copyright Act of 1905, and the Berlin Convention of 1908

**Eleventh Edition.** *A. B. C. Guide to Company Law and Practice.* By H. W. JORDAN. London Jordan & Sons. 1913.—The Author, who is a company registration agent of great experience, had for the object of the book the desire to meet the needs of company officials, and such other laymen as were interested, by setting out concisely the Companies Act 1908, the Stamp Act, and, so far as they affect companies a number of other Acts. The reminders to secretaries will be useful to officials, and the Author's purpose has apparently been attained with good effect.

NOTE.—The Contemporary Foreign Literature section is held over owing to the exigency of space

## A DISCLAIMER.

In the August number of this Magazine, at page 490, in reviewing Collard's *The Money Lenders Acts 1910 1911*, our Reviewer, whilst congratulating Mr. Collard upon a successful piece of work, remarked on the similarity of the book to Bellot's *Bargains with Money Lenders*. Mr. Collard joins issue with our Reviewer and states that "The scheme of the book was carefully con-"sidered by myself, and personally I can see no similarity to the book you "mention. The Text is throughout based on reported cases and the 'Precedents "of Pleading' were compiled in consultation with well-known practitioners of the "Chancery and Common Law Bars" We are glad to accept Mr. Collard's statement that there is absolutely no foundation for our Reviewer's assertion.

## WORKS OF REFERENCE.

*Fry's Royal Guide to the London Charities.* Edited by JOHN LANE. London: Chatto & Windus. 1913.—This handy and reliable Guide, of which the present is the 49th edition, comprises an alphabetical list of all the charitable institutions in London, with a short summary of the objects, results, &c., of each, and in an Appendix is given, in greater detail, information concerning the more important of the hospitals and institutions. Persons concerned with the settlement of testamentary dispositions, and others having money for distribution for charitable purposes, will find this work of the greatest possible assistance.

*The Lawyer's Remembrancer and Pocket Book for 1913.* By A. POWELL, K.C., and H. BAKER WELFORD. London: Butterworth & Co.—The present issue of Mr. Powell's useful pocket book well maintains the high standard reached by previous ones. The contents appear to have been carefully revised and brought up to date, and the diary space has been enlarged. Mr. Powell now has the assistance of Mr. Baker Welford in the preparation of this little work, the latter being responsible for articles on Probate and Administration, Transfer and Registration of Land, Bills of Sale and Deeds of Arrangement, &c.

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*Sweet & Maxwell's Diary for Lawyers for 1913.* Edited by F. A. STRINGER and J. JOHNSTON.—In this Diary the numerous alterations rendered necessary by the Acts, Rules and Orders of the past year, appear to have been carefully noted. With each succeeding year new features are added to the work, the chief one in the present edition being a complete list of the members of the Law Society. How these new features have increased the bulk of the book may be gathered from the fact that during the past five years no less than 250 pages of information have been added. A complete Index makes for ready reference, and the Diary should be of great assistance to solicitors.

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*The Companies' Diary and Agenda Book, 1913.* Edited by J. H. DAVENPORT. London: Jordan & Sons.—Secretaries and others concerned with Companies and Company work will find this Diary exceedingly useful. In the first part it sets out the principal requirements of the Companies (Consolidation) Act 1908, and gives specimen forms of Returns for both private and public Companies; the diary space is ample, and the book is completed by about 50 pages of general information which a secretary will find useful to have at hand in a form so readily accessible for reference. The Diary may be had in various styles and prices.

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Books received, reviews of which have been held over owing to want of space:—Kuhn's *Comparative Study of the Law of Corporations*; *Chitty's Statutes*; Struycken's *Engelsche Staatsstukken*; *Coote's Law of Mortgages*; Davey's *Law of Rating*; Harrison's *Legal Levities and Brevities*: Moyle's *Imperatoris Justiniani Institutionum*; Oppenheim's *The Panama Canal Conflict*.

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Other Publications received:—*Sovereignty over the Air*, by Sir H. Erle Richards (Clarendon Press); Bisschopp's *Roman Dutch Law in South Africa*; Gorell Barnes and de Montmorency's *The Divorce Commission*; Escobedo's *Il Titlio per la Constituzione*; Borchard's *State Indemnity for Errors of Criminal Justice*; Dewar's *Criminal Procedure in England and Scotland*.

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The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Juridical Review*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Law Students' Journal*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer* (India), *South African Law Journal*.

THE

# LAW MAGAZINE AND REVIEW.

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## I.—THE FRENCH JUDICIAL SYSTEM:

### I.—CIVIL.

THE North and South Poles are no nearer each other than are many of the principles of justice and procedure of England and the United States to those of France, and, in fact, to those prevailing as a rule in Latin countries. It is not only the divergence in many elementary principles, but the manner of their enforcement—the different way of regarding and dealing with fundamental ideas of right and wrong and of the best methods of ascertaining the truth—that makes it so difficult for the Anglo-Saxon to understand French jurisprudence and the administration of justice in France. Although at first view the Anglo-Saxon is apt to derive the notion that justice between man and man is not evenly administered under a system so completely divergent from his own, yet with experience and a closer knowledge he soon realises that the scales of justice in France are as evenly balanced as in his own land. But for the stranger to come to this conclusion takes time; it requires an understanding of the constitution, jurisdiction, and operation of the various courts, the rules of procedure, and the administration of justice.

While French civil practice differs materially from that of American and English courts, yet the machinery of

the French system in the end is capable of accomplishing all that a litigant can attain by those more cumbersome methods, and with far less trouble, annoyance, and money. Speed and simplicity are the predominant features of French procedure.

The French civil judicial system, in many respects, has its advantage over that of England and the United States, as, for example, in the rapidity in which commercial disputes can be settled and the comparative small expense entailed; in the production of evidence; in the absence of those technical questions on the admission of testimony that fill our law reports, and in pleadings that, although regulated by and confined to well-established rules, are not subject to those interminable controversies with which the English and American lawyer is so familiar. In many other ways, however, such as pressing a judgment debtor, and enforcing a judgment when obtained, French procedure lacks those vigorous methods of pursuit peculiar to Anglo-Saxon procedure, and consequently too often enables an adroit, unprincipled debtor, although capable of liquidating his debt, to easily escape and go scot-free; and in the non-admissibility in many instances of witnesses, thoroughly familiar with the facts, on the ground of self-interest —that antiquated theory that once prevailed in England and the United States, but which has long since been discarded as unsuitable to the proper administration of justice.

It is difficult, if not impossible, for a person, educated under the principles of Anglo-Saxon law, to become imbued with those of the Civil law where exclusively used and the procedure thereunder. The two systems are diametrically opposed, and their very basis and foundation are antagonistic. Under Anglo-Saxon law everyone is assumed to be honest—everyone is presumed to be innocent until proven guilty—and a man's unwritten word is as good as his bond. Under the Civil law, however, everyone is regarded

with suspicion, and self-interest is accepted as a sufficient reason to discredit everything he does or says—in other words, he is presumed to prevaricate, and judges possess the right, even in the absence of any positive rule or legislation on the subject, of excluding the testimony of any witness on the ground that, in their opinion, the testimony is not sincere owing to the witnesses' interest in the litigation. This may appear like a very broad and unjust statement, but it is not so; it is justified by daily experience.

That people are assumed to be dishonest instead of honest is illustrated in many little ways. For instance, a party to a suit and his household domestics and employees are presumed to be so incapable of telling the truth that they are precluded from testifying with the single exception of a divorce suit. In other words, a party and those living in his house and serving him are discredited—they are not believed to be sincere in what they say. And should you meet with an automobile accident, neither your testimony nor that of your chauffeur would be received as conclusive on the ground of self-interest; you would have to look about for some by-stander or pick up some witness in the street if you hope to prove your case in a court of justice. It is for this reason that one constantly sees after an accident those concerned standing idly about waiting for the appearance of a sergent de ville because his report or *procès verbal* is official and legal evidence; he jots down the facts as he finds them, and the names of witnesses, and in this way the circumstances are preserved for future use. Where certificates are given servants on leaving, these, although signed by the employer, are regarded as worthless unless the signature is duly attested by the commissaire de police of the quarter where the employer resides, the mere unverified signature having no probative value.

There are no officers for the administration of oaths, such as Commissioners for oaths or Notaries Public, nor are

oaths required, ordinary pleadings and petitions not being sworn to; and the usual affidavit, so familiar in Anglo-Saxon practice, is unknown, except where introduced in a case by International lawyers. In an ordinary civil case none of the evidence is verified, nor are there any restrictions or limitations as to what may be introduced as evidence, everything being admissible even to newspaper cuttings and unverified telegrams. Everything goes in, but then comes the cleverness and adroitness of the French avocat, who is a master in the art of sifting and analysing papers, letters, and documents, so that in the end only such as have a real and legitimate bearing on the issue are taken into consideration by the court. Nothing surprises a stranger more than to be told it is only on the rarest occasion that witnesses are heard in a civil case, and then only when an *enquête* is ordered—that is to say, an examination orally of witnesses before a judge alone, as happens frequently in divorce cases; or before a master or referee (*arbitre*), or an appraiser or valuer (*expert*), who is appointed to investigate and report as to the injury done or the value or quality of work, or the condition of property, such, for example, as an automobile. But in no instance does the avocat personally interrogate a witness. At an *enquête* the avocat or avoué remains present like a disinterested spectator, while the judge interrogates the witnesses, and takes down their testimony in narrative form. He may, however, request the judge to put some additional questions to the witness, but he cannot insist on this. In civil cases the evidence is not recorded in the form of questions and answers. There is nothing like those wearisome objections to the admission of evidence, on the ground that it is incompetent, irrelevant and immaterial, that constantly encumber a trial in the United States, and as jury trials do not exist in civil cases, except in cases of eminent domain, all those dilatory and artificial requests to charge,

and objections to the judge's charge, that so often end in the failure of a litigation aside from the merits involved, are unknown in France. In this respect the French system is vastly superior to the practice before American tribunals, where a large per-centage of cases are lost or won, not on their merits, but because of some error in practice or procedure committed by the counsel engaged or by the Court itself. In such case the client suffers, but he is left without remedy or redress. The absurdity to which these technicalities are carried in America has reduced the practice of the law to a black art, in which the interests of clients are daily sacrificed, through mistakes of commission or omission, in an attempt to live up to the numberless artificial rules that have gradually attached themselves to the practice of the law and become an incubus. Happily, nothing of this kind exists in France, where a better sense of justice prevails; that is to say, where the law is regarded as a means for the quick and just settlement of disputes according to their merits, and where, if a man has a good case, he does not run ninety chances in one hundred of being beaten through some trifling indiscretion or officiousness of his avocat in the examination of witnesses, or by reason of the judge putting the case to the jury in an inartificial and inartistic way. In France cases get down to their real basis, and the truth is sure to come out, instead of being smothered under collateral questions that have nothing whatever to do with the matters at issue.

One of the reasons that enables French procedure to dispense with oaths and bonds is that the fabric of the French system is constructed under the constant surveillance of administrative and judicial officers, all of whom are educated and admitted into their several orders after most careful examination as to their moral and financial standing, and who are individually and pecuniarily responsible for their acts, not only to their clients, but likewise to

their orders, the heads of which exercise a strict and immediate control over their actions. In this way a degree of dignity and responsibility is attained that does away with the necessity of oaths and bonds for lawyers, and ministerial officers are placed on their probity and honour to that extent that every pleading and all process is not only presumed to be correct, but has the personal cachet of the individual from whom they emanate, and for whose slightest dereliction the most serious consequences are sure to follow. No one ever questions the act of an avoué, a notaire, a huissier, or an avocat, because their acts are those of public officials whose slightest omission or neglect makes them immediately amenable to discipline or disgrace, or even expulsion from their order or chamber. In this way the highest tone of moral and professional etiquette is preserved. It is this close watchfulness—this constant vigilance of the governing bodies of the various judicial and administrative officers that gives to the French judicial system much of its recognised and unquestioned high standing.

The Ministere Public is represented by an official or magistrate before every court in France, except the Tribunal de Commerce, Conseil des Prudhommes, and Justices of the Peace. Before the Cour de Cassation there is a Procureur Général and six Avocats Généraux. In the Cour d'Appel there is a Procureur Général, one or more Avocats Généraux, and a number of substitutes, while the Tribunaux de Première Instance have a Procureur de la République and usually one or more substitutes. Their functions consist in watching, requiring, and insisting in the name of the Government on the execution of the laws, decrees, and judgments, and, by virtue of their office, to follow and prosecute all matters concerning public order, the public domain, the rights of the State, and of those persons who are incapable of defending themselves; and to intervene as a party principal in a large number of

instances where specially authorised by law to do so. They take part in every civil case and orally present their views to the court, joining in the conclusions submitted by the avocat whose side they espouse. In such case they examine the pleadings and evidence, but take no part in the procedure, nor can they submit to the court any conclusions other than those represented by one of the parties. These magistrates form an important feature of the courts, and their views and support have naturally much weight with the judges, so that not only has an avocat in a civil case to convince the court of the merits and justice of his case, but he has also to obtain the favourable opinion of the Ministère Public in order to have the force and benefit of his co-operation. These officials, it will be seen, in their combined and various duties embody the duties of an attorney-general and district attorney or public prosecuting officer.

The doctrine so well known in Anglo-Saxon jurisprudence —*stare decicis*—is unknown to French law. It means to adhere to decided cases—it is the doctrine of precedent. A precedent is a judicial decision which serves as a rule for future determination in similar or analogous cases, but in French jurisprudence courts do not refer to other cases—precedents are rarely cited by the court, this being left entirely to the avocat. One of the results of this system is that on almost any question there have arisen a multitude of theories, or what are called systems, each backed by numerous decided cases or the books of well-known text-writers on law, so that one is never quite sure what particular system the court may apply to the facts of a given case. One would imagine that the adoption of the doctrine of *stare decicis*—the following of cases adjured by the higher courts—would be essential to the stability and uniformity of the proper administration of justice, but this does not appear to be so. The practice has its advantages in the independence of the courts to render their judgments

untrammelled by any motive except to apply some general principle to the facts as they may be presented, and in the practical administration of the law in France equity and right in the end prevail. Under Anglo-Saxon jurisprudence, courts are reluctant to interfere with the rules laid down by a court of last resort, and will uphold them even though they would, except for such precedent, decide differently; while under French jurisprudence, as precedents are scarcely ever quoted in judgments, courts are free to follow, and usually do follow, their own inclinations, even though they may be contrary to some adjudicated case. For this reason there is no such thing as an opinion by the court—judges never express an opinion—the only document being a carefully-worded judgment that recites the facts and the contentions of the parties, and then states the law applicable. Judgments are rendered by the majority of the judges, but the personality and individuality of the judges are never revealed, as their names do not appear, and for this reason one never hears of prevailing and dissenting opinions, a judgment being the judgment of the court as such and not the judgment of any designated judge.

The life of the French avocat is not passed in his office or *étude* in the same way that most English and American lawyers do, for, except among the few prominent leaders in large cities in England and the United States, most lawyers in London and New York are generally found at their offices. In France, however, and especially in Paris, this is not the case, as the entire Bar, consisting of avocats and avoués, go with the regularity of clockwork day after day to the Palais de Justice, where they remain until late in the afternoon, ordinarily getting back to their offices at five o'clock. Most of their time is consequently passed at the Palais. There they betake themselves daily, whether they have an engagement in court or not, and, robed, mix in the multitude, so that, whether occupied or idle, the French

avocat always appears animated and busy; he pleads from court to court; promenades the labyrinth of long corridors, or saunters through the *vestiaire*, or works in the library. The Palais is practically a Club—a rallying place—where the brethren meet; where they plead and try cases, or, robed, stroll and chat and pass the time away. Taking the Paris Bar for example, there are about 3,000 avocats of the Cour d'Appel, an avocat being the same as a barrister or counsellor-at-law. An avocat does not have an office, but receives and sees clients at his house, as well as avoués who entrust matters to them, an avoué being equivalent to a solicitor or attorney-at-law. An avocat never advertises, nor was it until last year professional etiquette to have professional cards or official letter paper. The standing and integrity of the Bar is maintained with severity. An avocat, having undertaken a case, cannot let it go by default even on the pretext that his fees are not paid; and while according to law he has the legal right to sue for and recover his fees, yet this is forbidden by many of the Bars, such as that of Paris, which prohibits an avocat suing for his compensation, punishing such an act as one of the most grave infractions of professional duty. Professional compensation is regarded as voluntary, and it cannot be fixed at so much a month, or so much a case, or based on a share of the recovery, or conditional on success. The *secret professionnel* and personal honour and probity of the Bar is scrupulously guarded, and nowhere is the dignity and high standing of professional rectitude more thoroughly safeguarded than in France.

The different Bars are under the guidance and supervision of a council of the Order, who annually elect a bâtonnier or president, the bâtonnier of the order of avocats of Paris being the distinguished avocat Fernand Labori. Keen, energetic, brilliant, learned, and with unsurpassed eloquence, Maître Labori's reputation has long since become

international; it is a pleasure to know him—an honour to be his friend.

A minor can practice before the courts. There is nothing in the law prohibiting this, and, on the contrary, it can be implicitly inferred from the fact that students can be 16 years of age when they enter law schools, and that the course of study is three years, at the end of which they can be licensed, and on taking the oath they become avocats, and as such are entitled to wear the robe with the insignia of the order—the chausse or shoulder-knot on the left shoulder. These, however, are not so much the insignia of their profession as distinctive signs of their licensed grade. Once having taken the oath of avocat, the individual has the right to retain the appellation even though he has resigned or ceased to practice, as the title of avocat is distinct from the practice of law. He may still be an avocat although not an avocat à la Cour; here lies the distinction. French nationality is essential to the profession of an avocat, but this does not mean citizenship; for one can be of French nationality without being a French citizen. Avocats of the Cour d'Appel plead before all jurisdictions except before the Cour des Comptes, the Conseil d'Etat, the Tribunal des Conflits, and the Cour de Cassation, although they can by special authorisation be permitted to plead before the Criminal Chamber of the latter court.

The avocats of the Cour de Cassation are a select body numbering about sixty. They alone possess the double quality of attorney and counsellor-at-law in so far that they perform the double functions of avoué and avocat. All documents in the procedure in those high courts wherein they practice are signed by avocats of the Cour de Cassation.

An avoué is practically an attorney of record. He drafts and serves the legal documents and pleadings in a cause, petitions, decrees, orders and judgments; besides these he

performs other functions, such, for instance, as the sale of property by auction. The Chamber of Avoués is a close corporation, and vacancies by death, resignation, or other cause are filled by an order of the President of the Republic after certain formalities and with the consent of the Chamber; and an avoué's *étude* or business has a readily estimated marketable value, the same as that of a notaire. Every litigant must be represented by an avoué, although avoués have not the right to plead, except before courts where there are less than five avocats affiliated. An avoué can only practice before the Tribunal to which he is associated, so that there are avoués at the Cour d'Appel as well as those of the Tribunal Civil.

While parties to a suit, assisted by their avoués, may personally plead their own cause without the assistance of an avocat, yet the Tribunal has power to withdraw this privilege if it sees that passion or inexperience prevents a litigant presenting his case with ordinary propriety, or with that clearness necessary for the instruction of the judges. A party to a suit may therefore dispense with the services of an avocat, but he cannot do without those of an avoué.

The Cour de Cassation is the highest court in France. It is the court of final resort. Its existence dates back to 1790, when it first appeared as the Tribunal de Cassation, for, owing to the then prevailing revolutionary spirit, it was regarded unwise to use the word court, all courts then being designated as *Tribunaux*. Kings and Courts were considered terms irreconcilable with the spirit of Republicanism. The Cour de Cassation is composed of three chambers, the Chambre des Requêtes, the Chambre Civile, and the Chambre Criminelle. Cases are brought before the Cour de Cassation by what is known as a *pourvoi*, which is a written recital of the legal grounds why the judgment below should be reversed; and in civil matters this *pourvoi* is first presented to the Chambre des Requêtes

of the Cour de Cassation. If the Chambre des Requêtes concludes that the grounds of appeal are unfounded, the *pourvoi* is rejected in a judgment giving the reasons therefor, and that finally disposes of the appeal. If it comes to the conclusion that they are well taken, the *pourvoi* is then submitted by a simple decision, without reviewing the merits, to the Chambre Civile, which is alone authorised to give final judgment. It is apparent, therefore, that judgments by the Chambre Civile have much greater authority and a higher judicial value than those rendered by the Chambre des Requêtes, because, before the Chambre Civile can hear an appeal in a civil case, it must necessarily have been previously heard by the Chambre des Requêtes, in which case the two different chambers of the Cour de Cassation pass upon the appeal. In criminal matters there is only one chamber. Where the Cour de Cassation has reversed a judgment, and on a new trial the court below still adheres to the first judgment, and another appeal is taken to the Cour de Cassation, the court in such case sits with its several chambers united as a grand court, composed of 34 conseillers. The Cour de Cassation with *toutes chambres réunies* is the most solemn tribunal in France, and one of the most distinguished to be seen anywhere, and when its judgment is pronounced it is conclusive on the courts below. When an appeal has succeeded before the Cour de Cassation and a new trial is ordered, the case is sent before a court other than that which originally heard it; it is never referred to the same court. The Cour de Cassation only reviews questions of law, so that many appeals are rejected as they involve only questions of fact, in the determination of which the Cour d'Appel is sovereign. In election cases, or cases involving the right to vote, the law allows a direct appeal from a judgment of a justice of the peace to the Cour de Cassation, without the expense and delay of intermediate appeals. The first President of the Cour de

Cassation receives 30,000 francs a year, and the Presidents of the different chambers 25,000 francs. The salary of a counsellor or associate judge is 18,000 francs a year. There is another feature of the Cour de Cassation quite apart from its strictly judicial character. The Cour de Cassation constitutes the Superior Council of the Magistrature, and when all the chambers are united in solemn conclave it exercises full disciplinary powers over all judges of all courts, from the highest to the lowest. Its action, however, can only be invoked by the Keeper of the Seals, and then its judgment can only be rendered after the magistrate has appeared and been heard, or has been regularly summoned to appear.

One of the most important courts in France is the Conseil d'Etat or Council of State. It is one of the old and historical *tribunaux* of France. It might well be termed an administrative court. It is composed of thirty-two Councillors of State in ordinary service; eighteen Councillors of State in extraordinary service; thirty Masters of Requests (*Maîtres des Requêtes*), and thirty-six Auditors. Councillors of State in ordinary service are elected by the National Assembly, while those in extraordinary service, Masters of Requests, the Vice-President, and the Secretaries, are appointed by the President of the Republic. The Minister of Justice is the presiding officer. The Council of State, besides being an advisory or consultative body in relation to all administrative subjects and decrees, is largely judicial, and finally passes on controversial questions and disputes arising in the administrative departments, or involving the power or jurisdiction of an administrative officer; and it is also the tribunal having exclusive jurisdiction under the law of eminent domain, and in all proceedings relating to the acquiring of private property for public use, in which instance—a remarkable exception in French jurisprudence—a trial by jury is permitted.

For the expedition of business the Council of State is divided into five sections, that is to say:—1. Contests: 2. Legislation, justice and foreign affairs: 3. Interior, worship, public institution, and beaux-arts: 4. Finance, posts and telegraph, war, navy and colonies: 5. Public works, agriculture and commerce.

The Vice-President of the Council of State receives 25,000 francs a year; the Presidents of Sections, 18,000 francs; Councillors, 16,000 francs; Maîtres des Requêtes, 8,000 francs; and Auditors, 2,000 francs. The Council of State in general assembly cannot deliberate unless sixteen members are present. The section of contests is charged with the preparation of the evidence, and report on the disputed matters brought before the Council of State. This report is made to the Council of State in public session, which is composed of the members of the section together with eight Councillors in ordinary service, two being chosen from each of the other sections. A Maître des Requêtes represents the Ministère Public, and fulfils duties similar to those of the Procureur de la République in other courts. After the report on the matter in dispute has been read, the avocats of the parties interested are heard orally, and the Master of Requests gives his conclusions.

Only matters wherein an avocat has appeared, or when one of the Councillors of State or Masters of Requests has requested it, are heard before the Assembly Public, a public audience convened as a Council of contests.

It is only when one considers the vast number of administrative offices, the numerous questions of election constantly arising, and the complex matters connected with taxation, the customs, and the octroi, that the importance of the Council of State becomes evident.

Here, for example, are two matters that give an idea of some of the cases that come before the Council of State. An officer in charge of the laboratory of research, connected

with *l'aérostation militaire*, resigned. Some two years later he was confronted with a decree of the Minister of War, holding him responsible for the loss of several thousand francs worth of property alleged to be missing, but no inventory was made when he left the laboratory, nor did he have notice of the proceedings that led to his condemnation. The Council of State promptly quashed the proceedings and decree of the Minister of War with costs. In another case, decided in December, 1910, an individual had taken sand, between low and high tide, on the shore of the Mediterranean, contrary to an ordinance of August 6, 1681 —an ordinance over 230 years old. He was fined by the Conseil de Préfecture, and on appeal taken to the Council of State, the judgment was affirmed.

The French judicial system provides a special tribunal for disposing of conflicts involving the competency of the judicial and administrative departments and their officials, known as the Tribunal des Conflits. It is composed of the Garde des Sceaux (Keeper of the Seals) as president; three Councillors of State, elected every three years; three judges of the Cour de Cassation, named by their colleagues, and two Councillors of State elected by the other judges of the Council of State. The matters that come before this tribunal are complex, and the procedure and rules governing this tribunal are too intricate to consider at length, but the following is an example of a case that came recently before the court.

The mayor of a commune caused the overhanging branches fringing a parish road to be cut, whereupon the proprietor sued him before the civil court and recovered damages. The mayor took the ground that he was a public official carrying out a public work, and that the civil court was therefore incompetent—that there was a conflict between the administrative and judicial departments—and the civil court took this view and entered an

order to this effect. The case thereupon came before the Tribunal des Conflits, which held, that as the mayor had not observed the law, requiring in such cases a preliminary *constate*, and notice to the proprietor to do the necessary lopping himself, and as such work did not constitute a public work, the civil tribunal was competent.

The Cour des Comptes, contrary to general impression, is not only an administrative court for the supervision and control of official accounts and expenditure, but possesses likewise strictly judicial functions. It is composed of eighty-six counsellors referendary appointed for life. By law this court stands next in rank to the Cour de Cassation. It is presided over by a first president, and is divided into three chambers, each with its own president. It has its own attorney-general. When necessary, the three chambers meet, forming a Chambre de Conseil. Where in the examination of accounts, forgery, embezzlement, or speculation is discovered, the fact is reported to the Minister of Finance and referred to the Minister of Justice, who prosecutes the offenders before the ordinary tribunal. An appeal lies in certain cases to the Council of State.

The Cour d'Appel is the intermediate court between the Tribunal de Première Instance and the Cour de Cassation. Including Algiers there are 27 Cours d'Appel in France, comprising 63 chambers, 27 first presidents, 63 presidents of chambers, and 491 counsellors or associate judges. The Cour d'Appel of Paris consists of nine chambers. The Cour d'Appel is not a court of original jurisdiction, although an appeal is practically a new trial when the case can be presented *de novo*, either party having the right to introduce new or additional evidence. Judgments must be rendered by at least five judges, except in appeals heard in *audiences solennelles*, or solemn audience, when not less than nine judges must participate. Solemn audience is where two or more chambers are united, the law providing that

certain questions must be heard before such a composite court, as, for instance, where a case has been sent back by the Cour de Cassation; or where it relates to the State or to the civil status of citizens. This, however, only applies to civil cases. The first president of the Cour d'Appel of Paris receives 25,000 francs a year, while in other departments his salary is 18,000 francs; the presidents of the different chambers in Paris get 13,750 francs, and outside of Paris 10,000 francs; while the counsellors or associate judges in Paris receive 11,000 francs, and in other Cours d'Appel they have 7,000 francs a year.

The Tribunal Civil, or Tribunal de Première Instance, as it is called, is the general court of original jurisdiction, there being one for every department, and in cities they comprise several chambers, the court in Paris being composed of 11 chambers. This court includes 438 chambers composed of 384 presidents or presiding judges; 667 judges, and 806 assistant judges, or a total of 1,857 judges. Judgments must be rendered by at least three judges. And this fact brings out one of the great distinctive features of the French judicial system, which is that no civil case outside the court of a justice of the peace is decided by a single judge, every court being composite in character, and no judgment can be rendered except by at least three judges. There is no appeal in cases involving less than 1,500 francs unless the question of the court's competency is involved.

The Conseils de Préfecture also exercise judicial functions. There is one in each department. In the department of the Seine (Paris) it consists of nine councillors; in thirty other departments of four, and in other departments of three. They are appointed by the President of the Republic. In the department of the Seine the préfet receives 50,000 francs a year, and counsellors 10,000 francs; in préfectures of the first class préfets receive 35,000 francs, and councillors 4,000; in préfectures of the second class préfets receive

24,000 francs, and councillors 3,000 francs; and in préfectures of the third class préfets receive 18,000 francs, and councillors 2,000 francs.

The Conseils de Préfecture are presided over by the préfet. A conseiller de préfecture must be 25 years of age; he must be a licentiate in law, or have during at least ten years performed compensated duties in the administrative or judicial departments, or have been for the same period a member of a *conseil général* or mayoralty. Their duties are incompatible with other public employment or the exercise of a profession. The meetings of the Conseil for the consideration of contested matters are public. After hearing the report on the matter at issue, made by one of the counsellors, the parties are permitted to be heard either in person or by their representative. The deliberation is in secret but the decision is made public. An appeal lies in all contested matters to the Conseil d'Etat; and by law certain articles of the Code of Procedure relating to procedure are made applicable to the Conseils de Préfecture. An affair that recently came before the French courts affords an example of the judicial functions of the Conseil de Préfecture. One of the public thoroughfares of Paris had long been in a state of upheaval, caused by a railway laying its electric cables. One evening a woman fell into an excavation on the side-walk and broke her leg. She sued the railway company before the civil court, which pronounced itself competent, but on appeal this judgment was reversed, the Cour d'Appel holding that the civil courts were not competent, and consequently sent the matter before the Conseil de Préfecture.

The Tribunal de Commerce is the great commercial court, the judges of which, like the officials of the Conseil des Prudhommes, being the only elected judicial officers in the Republic. The court is not founded on a strictly legal basis—that is, the judges are not lawyers trained in

the profession--but industrial, commercial, and business men. It is a speedy and practical tribunal for the determination of business and commercial disputes, and consequently has become one of the most influential and potent tribunals in France. It can well be described as the people's court, composed of and by the people, and presided over by judges of their own choice. All the members of the Tribunal de Commerce, including the president, judges, and assistant judges, are elected directly by a body of electors, and must receive a majority at least equal to a quarter of the registered voters. The judges must be 30 years of age, and have been engaged in French commerce in the *arrondissement*, where they reside, for at least five years. The president is elected from those who have performed the duties of judge for two years, and the judges are chosen from those who have served as assistant judges, the term of all judges being two years.

One of the most interesting tribunals in France is the Conseil des Prudhommes. It is, perhaps, the most artfully devised and democratic court in the world, for the reason, that besides being composed of elected officials, it is so constituted as to avoid the possibility of a dispute being judged except by a representative body composed of an equal number of partisans affiliated in position and occupation with each of the parties. It is the court of the factory and the workshop—of the contractor, the builder, the workman, the artisan, the mechanic, the merchant, the tradesman, and the clerk. The toilers, by day and by night, and their masters, come face to face before this simple tribunal and receive equal treatment, according to their own ideas of justice, which, although they may at times appear crude, are, however, tempered with as much equity and impartiality as elsewhere.

The Conseil des Prudhommes is a tribunal having jurisdiction over questions of wages and employment arising

in commerce and industry, between patrons or their representatives, and employees, workmen, and apprentices of either sex. Its main purpose is to afford the patron and working man a speedy and inexpensive means of adjusting their difference in conciliation, and in the event of failure, by an immediate judgment. The tribunal comprises a Bureau de Conciliation and a Bureau de Jugement. The Bureau de Conciliation is composed of a workman, an employee, and a patron, the foundation and theory on which the tribunal is established resting on the mixed composition of the councillors, so that absolute impartiality shall prevail, and equality of justice be assured between the parties. The Bureau de Conciliation is presided over by one of the three members, who is chosen alternately from the patrons, employees, or workmen. Its sessions must be held at least once a week, and they are not open to the public. The Bureau de Jugement, as it is called, always consists of an equal number of patrons and of employees or workmen; never less than two patrons and two employees or workmen, one of whom is the president or vice-president of the Conseil des Prudhommes, who preside alternately. Judgment is rendered by the majority of those present, and in case of an equal division—of their standing two to two—the affair is put over to be heard by the same tribunal at the earliest day possible, when the justice of the peace of the arrondissement, or canton, presides, thus making a tribunal composed of five individuals, and as the justice of the peace is neither a patron, employee, or workman, in this way that perfect evenness and equality between the capitalist and the working man is maintained, which all the way through is the one predominating feature of this labour court. The Bureau de Jugement is open to the public. There is only one Conseil des Prudhommes for each city, but the conseil can be divided into sections, each of which is autonomous. The Conseil's jurisdiction in matters

between patron and employee is limited to 1,000 francs, but between patron and workman it is unlimited; and where the amount is under 300 francs, no appeal lies. Appeals to the Civil Tribunal must be disposed of by that court within three months from notice of appeal. The procedure before the Conseil des Prudhommes is simple, quick, and inexpensive. It is in truth the poor man's court. The notice for conciliation is by simple letter. The notice to appear before the Bureau de Jugement is by registered letter, or by notice served by a marshal; and in both cases one clear day must intervene between the day of service and the hearing. In cases of 20 francs and under, the usual recording and registration fees are not required.

The last, but by no means the most insignificant court of the French judicial system, is that of the Justice de Paix, or Court of the Justice of the Peace. There is a Juge de Paix for every canton, and in cities one for each *arrondissement*. They have jurisdiction ordinarily up to 600 francs, and in exceptional cases up to 1,500 francs. The authority of these inferior courts becomes apparent when it is realised that no appeal lies from their judgment in matters involving less than 300 francs, and that they often decide questions of equity in which their determinations are final. This conclusive character of the judgment of the Juge de Paix in the great majority of cases, gives to them an importance and infallibility not enjoyed by superior tribunals—they know that most of their decisions cannot be reversed.

C. A. HERESHOFF BARTLETT.

## II.—FREEDOM OF CONTRACT.

THE important *dictum* of Jessel, M.R., in 1875, "You have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract," may be taken as embodying the most general principle of the whole law of contract. It represents what has always been the general policy of the law with regard to freedom of contract, viz.: that the validity of a contract is the rule; its invalidity is the exception. For as neither the right of free speech, nor the right of public meeting is expressly established by any positive enactment, still less is the right of freedom to contract. And yet the latter is of more importance than the two former; because this freedom of contract means nothing less than to establish legal rights and liabilities enforceable at law, and the power to invoke the aid of the law for the actual enforcement of these rights and liabilities which the parties to the contract have created. For a contract is "an agreement *enforceable at law*, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others."[1]

Sir Henry Maine says that in primitive systems of law there were no crimes, but only torts.[2] It would be as true to say that the law of tort was antecedent to the law of contract, and that the latter was to some extent formed from the law of tort.

By the end of the reign of Edward I, the legal recognition of the principle of contract was still imperfect. Even then there were only two kinds of contracts, viz.:—(1) the solemn contract under seal; and (2) the executed contract; of which one had already performed his part, and which

[1] Anson, *Law of Contract*, 13th edition (1912), p. 10.
[2] *Ancient Law*, edition of 1906, p. 379.

resembled the contracts *re* of the Roman Law. But the English writs of debt, detinue, and account, provided no remedy for the breach of an executory contract (in which neither party had as yet performed his part), nor even for breach of an executed contract where only an unliquidated sum was due for services actually performed.

In some cases, according to Maine, the legal remedy is antecedent to the legal right,[1] and it would seem to be so in those cases of executory contract not yet provided for by the existing law of contract in the time of Edward I.

In one important particular the law of contract has been evolved from the law of tort. The old Common-law writ of trespass, *vi et armis*, was necessarily confined to cases of some positive wrongful act: for even though the scope of the action at law were extended and the *vi et armis* to become a mere technicality, it would still be impossible to enable the remedy to cover anything but actual malfeasance.

Moreover, it was forbidden by the Provisions of Oxford (1259), that any new writs, other than the writs of course then on the register, should be issued by the chancellor without the consent of the king and his council: consequently, the development of the law of tort was for a time checked. But by a statute of Edward I. viz., the Statute of Westminster II, c. 24, it was provided that whenever new cases arose, analogous to those already provided for by the writs of course, then new writs should be drawn up in Chancery similar to the old forms, so that justice might be done.

Hence this Act has been called the statute *In consimili casu*. In an action based on this statute, the writ was called the writ of trespass on the case. It was essential that this writ of trespass on the case should state a *primâ facie* case: (1) that the defendant owed a duty to the plaintiff, and

[1] *Ancient Law*, ch. II

(2) that the defendant in breach of this duty did something causing detriment to the plaintiff. This duty might be one imposed by law (*e.g.*, to abstain from violence), in which case the action was for tort pure and simple, and the old writs of trespass generally sufficed: in other words, the action was for malfeasance.

But since the statute *In consimili casu* (1285), the recognised duty, instead of being one simply imposed by law, might also be one which the defendant had taken on himself (*super se assumpsisset*): in which case the action of assumpsit and the writ of trespass on the case were available. But at first, even the Court of Chancery was wary of extending the scope of these actions and writs; and they were confined to cases in which the defendant had actually commenced what he had undertaken, and had done it so badly as to do more harm than good, thereby causing detriment to the plaintiff; in such case the action was for misfeasance.

This process of development of the law of contract out of the law of tort, by means of an action for misfeasance, may be divided under two heads:—

(1) Persons professing to follow certain vocations and holding themselves out to perform certain services, *e.g.*, innkeepers, common carriers, smiths, and surgeons, were held liable to an action of trespass on the case for negligence in omitting to show such care and skill as one might reasonably expect of them in the performance of their work: and this was on the ground of public policy.

(2) Whether the defendant had or not openly professed and held himself out to perform services of a certain kind, he might be held liable for negligence in an action of trespass on the case, if it was the gist of the action that the defendant had specially undertaken to be liable for damage that might arise from his negligent or insufficient performance of the work.

The first class of cases calls for little comment: it is difficult to draw any hard and fast distinction between the two, and it would seem that in both classes of cases there was considered to be some element of deceit or fraud on the defendant's part amounting to tort. The first case in which this principle was recognised was in the reign of Edward III: in this case the defendant, having undertaken to convey plaintiff's cattle across the Humber, had so overloaded his (the defendant's) own boat, that it was upset and the cattle were drowned: the objection that the action should have been in covenant was over-ruled; and it was held that the overloading of the boat was a trespass.[1]

The second case of misfeasance was in 1370 (still in the reign of Edward III). In this case, the defendant, having undertaken to cure the plaintiff's horse, had done the work so negligently that the horse died: again it was objected by the defendant that the proper action was covenant; and again this objection was over-ruled; and it was held that the action was rightly framed in tort for negligence.[2]

In the reign of Henry IV the judges refused to extend the principle of the law with regard to misfeasance; they decided that mere nonfeasance could not be triable by action of trespass on the case.[3] But in 1425 there was a difference in the opinions of the judges; and though the opinion of Martin prevailed, viz., that mere nonfeasance was not triable by action of trespass on the case, yet there was a dissenting judgment in favour of extending the scope of this action.[4]

The next recorded action of trespass on the case, in which the principle of the law with regard to misfeasance was further extended, was in 1433, viz., the case of J. Somerton.[5] In this case the facts were as follows:—The defendant had

[1] 22 Ass., pl. 41, f. 94; the Register, ff. 105b, 108, 110, 110b.
[2] Y. B., 43 Edw. III, Mich., pl. 38. [3] *Ibid.*, 2 Hen. IV, Mich., pl. 9.
[4] *Ibid.*, 3 Hen. VI, Hil., pl. 33.
[5] *Ibid.*, 11 Hen. VI, Hil., pl. 10; Pasch., pl. 1; Trin., pl. 26.

agreed to act as counsel for the plaintiff in negotiating for the purchase of a manor, and plaintiff had agreed to pay defendant a fixed sum for his services: but the defendant, in fraud of his agreement, had become of counsel to a second employer, to whom he betrayed the plaintiff's secrets, and bought the manor for the second employer instead. The actual issue of this case is uncertain; but it would seem that the judges held that the defendant's deceit was actionable even apart from his having entered on his proper work. "Matter which lies in covenant may by matter arising *ex post facto* become deceit" [*per* Cotesmore].

And this extended principle of the action of trespass on the case was distinctly affirmed three years later by Newton in 1436:[1] after laying down certain principles already recognised, he said:—"If a doctor takes upon himself to cure me, and he gives me medicines but does not cure me, I shall have action on my case . . . . and the cause is in all these cases that there is an understanding and a matter in fact beyond the matter which sounds merely in covenant: in these cases the plaintiffs have suffered a wrong." And Judges Juyn and Paston held that nonfeasance was actionable as well as misfeasance: "for all that [misfeasance] is dependent upon the agreement and merely accessory to it; and as I have action upon that which is accessory, I shall have an action on the principal."

These decisions mark some advance on those of the reign of Henry IV, in which it had been decided that mere nonfeasance was not triable by action of trespass on the case. This advance is distinctly noticeable in the reign of Henry VI: in 1425 it was first suggested that mere nonfeasance was actionable as well as misfeasance.

It would seem, however, that even in 1436 this was still merely an *obiter dictum*; and Judge Martin had previously

[1] Y. B., 14 Hen. VI. p. 18.

said in 1425 that it would mean "that one shall have trespass for any breach of covenant in the world,"[1] and Dr. Holdsworth considers that its acceptance would have made it impossible to distinguish between agreements which the law would enforce and those which it would not enforce.[2]

In 1442, a Bill of Deceit was brought in the King's Bench[3] it being alleged that the defendant had agreed to sell land to the plaintiff, that plaintiff had actually paid him £100 for it, and that defendant in fraud of his agreement had then enfeoffed another person instead. Here the distinction between misfeasance and nonfeasance was further narrowed down: it was pointed out that to enfeoff a stranger and not to enfeoff the plaintiff was the same thing: if no action lay for the latter, how could there be an action for the former? It seems to have had some weight with the judges that the price had already been paid, but Judges Newton and Prisot held that a mere contract to sell land at a fixed price would entitle the purchaser to an action even though the price had not been paid, and would entitle the vendor to an action even though the land had not been conveyed. It would seem that the above cases of misfeasance were decided against the defendants on the ground that there was an element of deceit in the defendant's conduct. In 1487, however, it was held that the traverse of the alleged feoffment to another was good, because this feoffment to another was essential to an action for misfeasance;[4] but this was the last time the old distinction was upheld, for in 1504, Frowych, C. J., says:—"If I sell you my land and agree to enfeoff you and do not, you shall have a good action on the case.[5]

The reign of Henry VII marks the definite abandonment of the old distinction between misfeasance and nonfeasance in the action of deceit on the case. The reason for

[1] Y. B., 3 Hen. VI, Hil., pl. 33. [2] *History of English Law*, Vol. III, p. 337.
[3] Y. B., 20 Hen. VI, Trin., pl. 4. [4] *Ibid.*, 2 Hen. VII, Hil., pl. 15.
[5] *Ibid.*, 20 Hen. VII, Mich., pl. 18.

this gradual recognition of executory contracts by the Common-law courts was, that in so many cases the Court of Chancery was ready to grant a remedy where the Common law failed to do so. It is even said that there had been, as early as the beginning of the reign of Henry VI, a Chancery writ for an action on a wholly executory contract. But it was not till late in the reign of Henry VII that the Common-law judges distinctly recognised the right to proceed by action of assumpsit for nonfeasance as well as for misfeasance. Even then the words of Frowych leave it very doubtful whether the plaintiff could have succeeded under any circumstances, unless he had already performed his part of the agreement (*viz.*, paid the money): in other words, it was not yet settled law that a wholly executory contract could be sued on.

But at last, in the case of *Norwood* v. *Read*,[1] it was definitely decided that "every contract executory is an assumpsit in itself." In *Slade's Case*[2] it was finally settled that assumpsit lay upon any debt, and that "every contract executory imports in itself an assumpsit." But the great case in point is the case of *Nichols* v. *Raynberd*,[3] in this case plaintiff had agreed to deliver to defendant a cow; in consideration of which promise, the defendant had promised to pay plaintiff 50s. Plaintiff brought action of assumpsit; and it was held that he need not aver the delivery of the cow, because the consideration was promise for promise. And thus, there is yet another respect in which these decisions, and especially this last, are important. In the course of these decisions, which first made nonfeasance as well as misfeasance actionable, and then made a wholly executory contract actionable, there grew up the doctrine of consideration. It would seem that this doctrine of consideration was originally an equitable doctrine, and that it was adopted by the

[1] 1557, Plowden, 180. [2] 1603, 4 Co. Rep. 92a. [3] 1615, Hobart, 88.

Common-law courts from the Court of Chancery. As the action for nonfeasance of an executory contract was evolved out of the old action of trespass on the case, so meanwhile the doctrine of consideration (or *quid pro quo*) advanced *pari passu*. In those nonfeasance cases in the reign of Henry VII, the consideration for the defendant's promise was nothing less than actual performance by the plaintiff, which the defendant had obtained in fraud of his own agreement: hence the "action of deceit." But in these later cases of executory contracts in the reigns of Elizabeth and James I, it was not thought necessary that the defendant should have reaped any actual advantage from his breach of faith: the consideration (or *quid pro quo*) was promise for promise; and the test-question was not what the defendant had gained, but what the plaintiff had lost. As the action of assumpsit gradually acquired a more contractual and less of a delictal character, the measure of the damages became settled on the principle of what the plaintiff had lost by the defendant's conduct—and by the defendant's conduct, not necessarily in first making the agreement and then breaking it, but merely in breaking the agreement when made. From this it is but a short step to regard contractual right as a right *in rem*, viz., a right not merely as against the other party to the contract, but as against all the world; and for which right an action for damages will lie against anybody who interferes with it. In 1844, in the case of *Brown* v. *Boorman*,[1] Lord Campbell held that "wherever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the plaintiff may either recover in tort or in contract." Only nine years later, in the case of *Lumley* v. *Gye*,[2] it was held for the first time that an

[1] 11 Cl. & Fin., p. 44; 65 R. R., p. 10.
[2] 1853, 2 El. & Bl. 216.

action lay (against a third party) for procuring a breach of *any* contract; though as it seems there had been an old Common-law action by a master against a third party (in tort) "for harbouring a servant."

The cases illustrating the gradual evolution of a great part of the law of contract from the law of tort must show that as there is practically no limit to the possible kinds of trespass for which an action may be available, so there is *primâ facie* no limit to the conceivable instances of broken contracts for which damages may be claimed. In other words, the validity of a contract is the rule, its invalidity the exception.

The doctrine of consideration was adopted by the Common-law courts from the Chancery: there is evidence of the origin of this doctrine in the practice of the chancellor of inquiring into the intentions of the parties, in those contracts where there was no special solemnity of form (viz.: the sealed document) to constitute the contract and make it absolute in itself. The consideration was held to supply evidence of the intentions of the parties, and hence of the nature of the contract. There was little, if any, connection between the old Common-law theories of trespass and the new equitable principle of consideration; though the former may have prepared the way for the latter. It is one thing to say that the plaintiff must have incurred some detriment through acting in reliance on the defendant's promise; and quite another to say that the defendant must have had some legally sufficient inducement for making his promise.

The consideration (or *quid pro quo*) is not and never was the essence of a contract; and much less is the execution of the consideration (as work done) by the promisee. This is a most important particular to which we shall revert later. The mere fact of work having been done is not a *causa debendi*, and creates no obligation

whatever. And whatever the *causa debendi* may be, the *debitum* which does constitute the obligation is the promise by one of the parties and the agreement of both.

The consideration whether executed or executory is not the essence of the contract, but rather a sort of buttress to support it. As late as 1765, Lord Mansfield (a great authority on moral obligation) held that agreements in writing, at all events in commercial affairs, were valid without any consideration at all.[1] And though this particular *dictum* has not been followed in subsequent decisions, it is said by Anson[2] that the views of Lord Mansfield are a useful corrective to the impression of those who think that the rules of the law of contract from their logical completeness are inevitable.

That there must be a *causa* or some adequate lawful motive for contracting the debt, originated in the Canon law; and so the idea found expression in Courts of Equity in the fifteenth century through the chancellors, who at that time were all ecclesiastics. This is evident from *The Doctor and Student*, a treatise on the Canon law of the sixteenth century. And yet there has been considerable doubt as to whether there is any connection between this *causa* in the sense of the Canon law and the modern doctrine of consideration. It is true that there are important differences between the mediæval and the modern principle. There were also diversities of view in some of the earliest applications of the principle requiring a *causa*. Molina, a jurist of the sixteenth century (following the opinion of Felinus), regards the *causa* as a sort of rule of evidence to indicate the intention of the parties and prove the existence of the contract——" . . . . . *necessariam esse causæ expressionem: alioquin reus non cogetur solvere nisi actor causam sufficienter probet.*"[3]

[1] 3 Burrows, 1663. [2] *Law of Contract*, 13th edition, p. 65

[3] Molina: *De Justitia, Disput.* 257.

On the other hand, Lord Bacon thought it necessary to correct this canonical and mediæval view, by distinctly laying it down that "you shall never find a reason for this to the world's end in the law; but it is a reason of Chancery, and it is this: that no court of conscience will enforce *donum gratuitum*, though the intent appear never so clearly."[1] There is yet another important difference between the canonical and the equitable, viz., between the mediæval and the modern view. In *The Doctor and Student*, the Canon law is explained as follows:—

> "If A. promise to give B. £20 because *he hath* made him such a house, or *hath* lent him such a thing or such other like, I think him bound to keep his promise. But if his promise be so naked that there is no manner of consideration why it should be made, then I think him not bound to perform it, for it is to suppose that there was some error in the making of the promise . . . . . And in all such promises it must be understood that he that made the promise intended to be bound by it, for else, commonly after the doctors, he is not bound, unless he was bound to it *before* his promise . . . . ."

This is very different from the modern doctrine of consideration as laid down in the cases of *Eastwood* v. *Kenyon* in 1840,[2] and *Roscorla* v. *Thomas* in 1842,[3] viz., that to support a promise the consideration must be either present or future, and that past consideration is to no purpose.

But as it seems to the present writer, there are two currents of thought existing from mediæval and distinctly traceable down to modern times. In the case of *Lampleigh* v. *Brathwait* in 1614,[4] the old canonical view of Felinus and Molina was upheld to this extent—that a past consideration, if granted at the request of the promisor—is a sufficient *causa* to support the subsequent promise, which in this case was held enforceable by action of assumpsit. In this case

[1] Bacon: *Reading on the Statute of Uses.*
[2] 11 Adolphus and Ellis, 438. [3] 3 Q. B. 234.
[4] 1 *Smith's Leading Cases,* 11th ed., 141, and *Hobart,* 105.

it was held that, as a matter of fact, the original compliance with a request was not with a view to creating a legal obligation, but was "a meer voluntary courtesie": and yet this compliance was held sufficient *causa* to support a subsequent promise by the party whose request had been complied with. This looks something like the recognition of a purely moral obligation as sufficient *causa* to support a promise: the compliance could scarcely be regarded as *evidence* even of the intention to make the subsequent promise, still less of its having been made. The next case in which the same question was raised was not till 1835. In the meantime, Lord Mansfield had said in 1765,[1] that consideration was required as evidence only, and that in commercial cases a promise in writing need not be supported by consideration. Exactly the opposite was held by the Exchequer Chamber and by the House of Lords in 1778, in *Rann* v. *Hughes*,[2] namely, that a merely moral obligation is not sufficient consideration to support a promise. But in *Lee* v. *Muggeridge*[3] in 1813, Mansfield, C.J., again held, even more distinctly, that a moral obligation was sufficient consideration to support a subsequent promise.

In this case Mansfield, C.J., and Gibbs, J., held that "wherever there is an antecedent moral obligation and a subsequent promise to perform it, it is of sufficient validity for the plaintiff to be able to enforce it." In the case of *Wilkinson* v. *Oliveira* in 1835,[4] the promise to pay was admittedly subsequent to the alleged consideration; and yet Tindal, C.J., described the promise and the consideration as "mutual," presumably on the assumption that there was an implied promise at the time when the antecedent consideration was requested by the promisor, and that the subsequent promise was a sort

[1] *Pillans* v. *Van Mierop*.
[2] 7 T. R. 350.
[3] 5 Taunton, 36.
[4] 1 Bingham's New Cases, 490.

of ratification of it. As far as it goes, this decision of Tindal, C.J., rather supports Lord Mansfield's view, but not very strongly. The theory of moral obligation, as being a sufficient cause to support a promise, must have received a somewhat severe shock in the case of *Eastwood* v. *Kenyon* in 1840:[1] then Lord Denman said that "the doctrine of moral obligation would annihilate the necessity of any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it": he goes on to say, that such a thing was not heard of until the time of Lord Mansfield, and to imply that Lord Mansfield had dragged it in unnecessarily. It was decided in this case that past consideration was no consideration at all; and the same thing was also decided in *Roscorla* v. *Thomas* in 1842.[2] In the case of *Kaye* v. *Dutton* in 1844,[3] Tindal, C.J., held that, "where the consideration is one from which a promise is by law implied"—as in some cases the acceptance of services imports a promise to pay for them—"no express promise made in respect of that consideration after it has been executed, and differing from that which is by law implied, can be enforced." This *dictum* may be considered as throwing some light on the previous decision of Tindal, C.J., in *Wilkinson* v. *Oliveira*. In other words, whatever the antecedent implied promise may have been—if there was one at all—the subsequent express promise must not differ materially from it.

Thus we observe three rival theories as to the doctrine of consideration:—(1) the highly artificial doctrine of the Common-law judges (as per Lord Denman, 1840), perhaps the more artificial because originally borrowed from Equity, viz., that there must be (present or future) consideration to support a promise; (2) the doctrine of moral obligation (as

[1] 11 Adolphus and Ellis, 438. [2] 3 Q. B. 234.
[3] 7 Manning and Granger, 807.

per Lord Mansfield); and (3) the old canonical view of consideration as having a merely evidentiary value.

The theory of moral obligation may be considered as disposed of: but not so the canonical or evidentiary view of consideration. In the case of *Bradford* v. *Roulston*, in 1858,[1] it was held, that a past consideration granted at the request of the defendant was sufficient to support the defendant's subsequent promise in writing. The facts were fairly simple: the defendant introduced to the plaintiff two friends desirous of buying a ship but lacking £55 of the price; then, at the defendant's request, the plaintiff allowed the purchasers credit for the £55: subsequently, the defendant guaranteed in writing the payment of the £55.

Plaintiff sued for the amount; and it was held, that because the past consideration of allowing the purchasers credit had been at the defendant's request, therefore it was sufficient to support the defendant's subsequent promise. In this case the authorities were carefully quoted, and the rule in *Lampleigh* v. *Brathwait* strictly adhered to. However, it is considered by some writers that *Lampleigh* v. *Brathwait* and *Bradford* v. *Roulston* must either be supported on some different ground or abandoned. For according to Pollock, "there is no satisfactory modern instance of this doctrine, and it would perhaps now be held that the subsequent promise is only evidence of what the parties thought the service worth."[2] And likewise Anson, "the correct view seems to be that the subsequent promise is only binding when the request, the consideration, and the promise form substantially one transaction, so that the request is virtually the offer of a promise, the precise extent of which is hereafter to be ascertained."[3]

The less artificial and more logical reason here suggested by the two modern writers was actually adopted by Bowen,

[1] 8, Irish Common Law Reports, 468.

[2] *Principles of Contract*, 8th ed., p. 189. [3] *Law of Contract*, 13th ed., p. 122.

L.J., in *Stewart* v. *Casey*,[1] but without discarding the old *ratio decidendi* of *Lampleigh* v. *Brathwait* and *Bradford* v. *Roulston*.

In *Stewart* v. *Casey*, Lord Justice Bowen, said:—"Even if it were true, as some scientific students of law believe, that a past service cannot support a future promise, you must look at the document and see if the promise cannot receive a proper effect in some other way. Now the fact of a past service raises an implication that at the time it was rendered it was to be paid for, and, if it was a service which was to be paid for, when you get in the subsequent document a promise to pay, that promise may be treated either as an admission which evidences, or as a positive bargain which fixes, the amount of that reasonable remuneration, on the faith of which the service was originally rendered. So here for past services there is ample justification for the promise to give the third share."

This *dictum* of Bowen, L.J., is the last word of legal decision on the subject of past consideration. The same principle was admitted by the defendant in *Marshall* v. *McLaughlin*,[2] in which the present writer was plaintiff; in which case the actual promise was verbal merely, whereas in *Bradford* v. *Roulston* and *Stewart* v. *Casey* it was in writing.

Thus we see that the present law requiring consideration to support a promise is highly composite: it is the joint product of the above-mentioned decisions, which—apart from those of Lord Mansfield—are consistent or at least reconcileable with each other. There is the artificial Common-law rule, itself borrowed from Equity, that there must be (present or future) consideration; there is the equally artificial Common-law exception to this rule, viz., the exception in favour of past consideration. laid down

[1] L. R. [1892], 1 Ch. 115.
[2] In the Lambeth County Court of Surrey, March 1905.

in the cases of *Lampleigh* v. *Brathwait* and *Bradford* v. *Roulston*.

There is also the old canonical rule, traceable back to the middle ages and the writings of Felinus and Molina, which regards the consideration for a promise as having a merely evidentiary value: this evidentiary view of consideration is still supported by the modern authorities on *Lampleigh* v. *Brathwait* and *Bradford* v. *Roulston*, and especially by Bowen, L.J., in *Stewart* v. *Casey;* although these modern authorities fall far short of upholding the old canonical view, viz.: that the consideration necessary to support a promise is only important as having a merely evidentiary value as to the existence of the agreement.

R. L. MARSHALL.

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## III.—POSITIVE RIGHT.

THE thesis that Right is essentially a positive conception, is not held, as might be thought, by positivist philosophers alone. These, indeed, start from the principle that legal knowledge is legitimate only when it keeps within the limits of experience; now experience, as Vanni for example says, "only shows us Right as a fact of human society, as a historical phenomenon." It would on this hypothesis be absurd to speak of any kind of ideal Right, rational or absolute, which has no adequate correspondence in the realm of facts, but transcends them. The only Right really existing is that *in civitate positum*, that is, which is in vigour in a politically constituted society, at a certain historical moment, by the effect of determined forces. Such arguments are often repeated by the positivist writers, and repeated with an air of peremptory demonstration; whereas, if carefully examined, they are reduced to an argument in

a circle, or to a *petitio principii*, being based on the premise which is afterwards presented as conclusion. The impossibility of a Right not positive is deduced simply from the fact that it is supposed *a priori* that Right is only a phenomenon, and cannot have any other existence than what is empirical. The demonstration of this presupposed dogma seems superfluous to the positivists, who however have no hesitation in discarding, without a true critical analysis, the notion of natural Right in all its forms both ancient and modern. Admitting then that a Right not positive is not a Right, this adjective applied to a Right would be evidently void of meaning; and it is declared in so many words "a pleonasm" by Bergbohm, who however cannot exempt himself from using it, so vigorous and diffused (to his own infinite scandal) is the belief in a Right superior to this.

But if this simple solution of the problem can be understood as far as regards the positivist school, more grave and significant is the fact that philosophers of other schools also approximate, in a way, to the same solution. Some, inspired especially by Hegel and also by Vico, recognise that the idea of Right is absolute and inexhaustible, and transcends therefore in its essence all of its particular manifestations in the historical field, but on the other hand affirm that only in history is Right a reality. The traditional antithesis between the Right of nature (or of reason) and positive Right is resolved in this sense, for instance, by Lasson and Filomusi Guelfi; who in like manner deny the existence of all Right other than that which is positive, recognising nevertheless in this same contingent and changeable Right the impress of an eternal idea, which unfolds itself in the concrete through the series of actual institutes. The ideal element of Right—that which Vico called the "true (*verum*)"—is thus, according to this conception, imperfect standing alone, and should be integrated with the "certain (*certum*),"

that is with the historical "position," before Right can properly arise. Not without justice, observing such tendencies in modern idealistic philosophy of law, could an adversary of it, such as was Vanni, experience gratification from it, as with a partial agreement with the doctrines professed by him. "It is not then the positivists alone"—he exclaimed—"who affirm as the only true Right, positive Right!" And he adduced this argument in opposition to Petrone, who a little earlier, approximating much more closely to classical tradition, had vindicated the theoretical legitimacy of natural Right.

But very soon Petrone himself, resuming the discussion, declared that by natural Right should be understood "not a concrete and perfect right," but only "a *principium cognoscendi* of just laws of conduct in the order of social life"; and afterwards came to abandon the antithesis between natural and positive Right, reducing it to that between justice and Right, and conceding to positivism that "the simple ideal concept of justice cannot count as Right in the rigorous sense of the word, independently of its objectification and of social sanction." "Right," he explained, "requires to have for its character objectivity, determined, formulated, and limited consistence, that is, exterior and positive determination. The essential pivot of the existence of Right is in the θέσις, in the "Satzûng,"—is, that is, in its placing, in its "position"; without which, mere justice is the result, and justice not objectified;—amorphous and disarticulated justice, ideologic, subjective justice, and not Right properly so-called." In such manner, and still without substantially changing his speculative attitude towards the problem, Petrone, in the particular question which now engages us, came to accept a solution analogous to that proposed by his adversaries.

It is right however, at this point, to say that in all these philosophical controversies the positivity of Right is always

understood in a much more extensive sense than that used by practical lawyers who are not philosophers. For the lawyer, "positive Right" often means only the system in vigour in the State to which he belongs; whence, it follows, that the rules observed by other peoples and at other times would not be called positive, and much less still those which are peculiar to peoples and times very remote. Such restrictive use of the term is without doubt connected with that mental habit which Bacon had already well defined, when, to the faults characteristic of philosophers, he opposed those not less characteristic of jurists: "*Philosophi proponunt multa dictu pulchra, sed ab usu remota. Jurisconsulti autem suæ quisque patriæ legum, vel etiam Romanarum aut pontificiarum, placitis obnoxii et addicti, judicio sincero non utuntur, sed tamquam e vinculis sermocinantur.*"[1] Indeed, nothing is more deeply opposed to a scientific comprehension of the phenomena of Right, than a one-sided attention to the institutions peculiar to a particular community at a certain moment in history; as if the same institutions were not subject to that law of relativity which governs equally all phenomena, and were capable of being considered as the exclusive source of authority. But with such an illusion we need not occupy ourselves; as it is here simply a question of a mere subjective illusion which dissolves in the very act of being presented; and not of a theoretically elaborated criterion, more or less capable of argumentative defence. On this point, all the schools of legal philosophy are and should be in agreement: that Right has everywhere a phenomenal or positive reality, inasmuch as it is produced and placed historically in every human society; whether or no it may have, besides that, another reality metempirical or purely ideal.

To resolve this latter, which is the real question, it is, however, necessary to pause for a short while to consider

[1] Bacon, *De dign. et augm. scientiarum*, L. VIII, *De justitia universali sive de fontibus juris*, Proemium.

this point, which is commonly taken for granted, and is not always cleared up with exactness; it is necessary to ask oneself: When is Right really "positive"? How is it made complete, and in what does its "position" essentially consist?

The answer to such questions would be simple, if the rule of Right always grew up in an uniform manner, and if it were, in one and the same moment, conceived, formulated, and applied. But no one is ignorant that the coming into force of any rule whatever pre-supposes a very complicated process and often a very long one.

There are, among all Peoples, some fundamental convictions regarding modes and aims of conduct, which represent the common exigencies of human nature, displayed according to the degree of their development, and in relation to certain elements of outward fact. Such convictions determine generally all the forms under which life shows itself, and accordingly the juridical system among others, although they are not found written in the provisions of any code. Subordinate to these fundamental determinations, which have as their distinguishing characteristic a minimum of liability to change, juridical rules come to be elaborated and modified, together with the other rules of conduct. This process of elaboration is of its nature continuous, and takes place as much by collective and anonymous action as by specially constituted organs, which are of use only in so far as they are recognised and accepted by the preponderant social will (principle of "historical sufficient reason"). Sometimes the formulation of the rule precedes and determines its observance; at other times the contrary happens, and the rule is first observed and applied before it is expressed. In every case, the will which formulates itself in imperative terms represents the result and synthesis of many wills: the historical establishment of Right has always had root in the exigencies and

aspirations of individual consciences. Not that these are constantly in unison with each other, as if simultaneously inspired by a transcendent existence, as the historical school supposed. The truth is rather that every subject helps in a certain manner, even though it may be in a minimum degree, in the production of Right, bringing his juridical appraisements to intervene in the social fabric along with those of others. That which we call the positive Right of a people is accurately the average expression of these evaluations, their equation in historical fact, always approximative, and therefore constantly in process of renewal.

If by positive Right we understand that which, at a given moment, effectively governs the life of a people, it is clear that we should understand it to include also that part which was never the object of any express establishment; whence it would be absurd to restrict, for example, the qualification of "positive" to such Right only as is established by statute. Rather it may well be asked if all that which is established by statute is really positive Right. As regards which, it is as well to remember, in the first place, that in many statutes there are found elements which are not juridical: for example, historical narrations, affirmations of faith, financial calculations; and the distinction between "formal laws" and "material laws" is based precisely on the recognised want, in some statutes, of a truly and specifically juridical content. Moreover, even if we take statutes containing rules of Right, it cannot really be said that they are always "positive," through the mere fact of their promulgation. They may have the extrinsic marks of validity; but we are obliged to have regard, according to the above criterion, to their effective application and applicability. Cases of statutes which have not been expressly abrogated, and have nevertheless remained and become a dead letter, occur frequently in the juridical history even of highly advanced peoples; whether

on account of the fact that contingencies of events prevent the possibility of putting certain rules into practice, or whether on account of the acceptance of new judicial principles in their place. Not therefore all statutes—as, on the other hand, not only statutes—really constitute the positive Right of a people.

Neither can the "positive" quality be made to depend on practice alone, even if constantly followed. The repetition of uniform acts is not enough in itself to produce a custom in the juridical sense. There are rules generally observed, often from time immemorial, and founded on an idea of utility and convenience, which nevertheless do not imply any obligation so far as the relations between individuals are concerned. There are also rules, which are reputed obligatory in the sense that their infraction would justify public blame, but which are all the same without any objective exigibility; whence the character of Right is denied them, and with reason.

In order that a positive Right may really exist it is not enough, therefore, to have the abstract expression of a juridical precept, nor, on the other hand, the observance of any usage whatsoever; but it is necessary that *a criterion of a juridical nature*—that is, one which establishes an obligation and a correlative claim—be inserted in the system regulating the conduct of a certain people, so that *its observance does not depend on the mere will* of him who is obliged, nor on the mere force of him who may be interested. It is necessary, in other words, that a social organisation should exist, capable of confirming the will of each, so far as it aims at the fulfilling of a rule of Right.

The critical moment at which the existence of a juridical positive rule—whether introduced by enactment or usage—is revealed and demonstrated in an obvious manner, is that of judicial application. This application gives in reality to the rule an actual and concrete efficiency: it takes it

from its state of generic power and brings it in contact with living reality, which receives from it the definite imprint. One would be tempted—following a facile but superficial "realism"—to consider Right "positive" only at this its particular moment. But the truth is, that Right exists and works, of itself informing social relations, even before the judicial sentence and independently of it: the *possibility* of having a rule made effective by means of the organs of the State renders the rule itself "positive," even if that possibility is not effectuated, and thus remains virtual only; as it must indeed remain in most cases, for it is beyond doubt that every rule would in fact be invalid, if it were not in most cases observed spontaneously.

An admission that the "positive" character of a rule consists only in the act of its judicial application, would amount to confounding the function of the judge with that of the legislator—practically annulling the latter, and taking away from the former its proper basis. The intrinsic logic of the judicial function in truth obliges us to conceive of Right as objectively anterior, that is as already declared to the judge, who ought not to create it, but to recover it and declare its application in respect of each case. If the law does not yet exist (as, for instance, in the first stages of judicial evolution), or cannot be applied to the case in question, the judge should refer himself to the logical organism of the system in vigour, regarding it as a single and comprehensive unit, at least virtually, of the entire scheme of things. Historical and psychological observation confirms the necessity of such reference to an universal maxim, which, even if discovered and formulated on the occasion of a particular judgment, does not, because of that, derive from it, but on the contrary ought to precede it, to invest it with intelligibility and authority.

That tendency is therefore to be combatted, which to-day manifests itself in the school of so-called "free Right": in

accordance with the dictates of which it is thought proper to leave to the will of the judge not only the decision of each case, but also the determination of the rule to be followed in it. In such a system the essentials and the logical limits of the judicial function are entirely misconceived; limits which in the modern State perform also the function of a fundamental guarantee of liberty. The improper use of words should not lead one into error: the pretence of "liberty in the application of Right" would effectively constitute, besides a theoretical paralogism, a permanent danger to the legal liberty of the citizen, which has as one of its principal conditions the certainty of Right, and especially, the unshaken sovereignty of the law.

This, of course, is not equivalent to saying that the judge ought to turn himself into a blind instrument for the mechanical application of Right. In so far as he should oppose himself to such a conception the *freirechtliche Bewegung* would be fully justified. Nobody can be ignorant that the interpretation of Right, and especially that which is required of the judge, is a genuine and original consideration of it, that supposes a deep aptitude for it, while it profits by all suggestions evoked by the ever new relations which arise. This judicial interpretation is a subordinate element, but a necessary one for the full development of the system in force: it excites, like leaven, its ideal and hidden powers, and discovers often in ancient laws meanings which their authors could not have explored. But though the logical foundations of the system and the organic unity of its structure remain unchanged by the interpreter, still within these limits the system receives new and fruitful increases in the course of its application.

Thus by degrees the natural human vocation for Right becomes historically determined and verified: the common necessities, sunk so to speak in our spirit, are translated, in the words of Vico, into "maxims witnessed by Justice";

and the maxims formulated in universal categories descend to an infinite series of contingencies, they submit and adhere to the particular cases. The whole system regarded in its entirety does not admit of any sharp divisions, nor does it undergo change *ex abrupto;* but a continual organic process of elaboration permits of its progressive renewal, which can never be interrupted, unless by an interruption of life itself. It so happens that a juridical idea may have to be defended for centuries, before finding its place among positive ordinances; whether that event happens by express determination, when the idea has acquired sufficient historical force, or whether it begins by informing, perhaps unnoticed, the practice through separate cases of its application.

Now, if the process which leads to the imparting of a "positive" quality to Right on the stage of historic fact is of this nature; if, dealing with such a thing as a process or an empirical turning point, it is not possible to establish *a priori* the moment at which a legal idea becomes positive, nor that in which it ceases to be such; to us it seems clear that the quality of "positiveness" cannot possibly be regarded as essential to or immanent in the idea itself, but should rather be regarded as an extrinsic and accidental element. The facts or the series of facts that render a juridical determination "positive," do not make it at the same time juridical; since this latter property is not historical, but purely logical, and in this sense is above the changes and lapse of time. Whatever may be the degree of social force which sustains it—whether or no enduring for a certain predominant time, whether affirmed by some individual only or by many, a legal proposition retains its own characteristic meaning; that is, it remains a legal proposition: if not, then in order to discover in it such a character it is necessary first to make sure of the application which it may have had at some particular moment or other of history!

What are the logical elements that properly constitute the juridical character, has been incidentally mentioned already, and may here be briefly summed up.

Among the forms of evaluation and determination of conduct, there must necessarily be one which concerns the actions of a multiplicity of persons so far as they meet and intermingle with each other. In other words, a criterion must be established, according to which an objective scheme may be deduced—some system of reciprocal compatibility and accommodation between the persons concerned: without which no ethic would be possible, or at least satisfactory, since human conduct would remain undefined and amorphous in one of its most fundamental aspects. Right is precisely this criterion, which values and defines in an objective or correlative sense the conduct of several persons. It does not take into consideration the activities of anyone, except in so far as it has relations with the activities of others; it does not regulate the conduct of the individual *uti singulus*, but only of the *socius*. Every predicate that is juridical is therefore trans-subjective and two-sided, implying a condition of alterity, a limit and relation between a multiplicity of people. This relation, however various may be the contents of it, has always the formal consequence that what is recognised as permitted on one side cannot be prevented by the other. Legality is similarly an effective claim of respect, to which corresponds an analogous obligation; and upon this rigorous correspondence between the terms of the relation its legal nature depends.

Any proposition which satisfies this formula, that is, the existence of such an inter-subjective relation, has without doubt the character of Right. Whence results the identity, and, at the same time, the changeableness of Right; since infinite propositions are possible according to the same logical species, as history itself, in almost continuous

examples, makes evident. But not all juridical propositions have been historically verified, and those which have been verified with one people, have not always been verified with others; those which ruled in a certain age frequently fell away in a following epoch. Positivity is then an episode that may take place, and will certainly take place, in respect of juridical ideas which so far have not been effected; while many which at present are in force will come to an end.

To consider as a right only what seems "positive" to us would lead us logically to deny the juridical character of all the systems that have not reached such an empirical phase, or that have passed it. For that matter (for instance) in so far as the Right created by Roman law has ceased to be "positive," so far would it have ceased to be Right! Again, the nature of juridical rules (for instance, projects of laws) that are being elaborated in place of, or in addition to those in force, would be misconceived; and they would be ascribed to some other indeterminate category, until the instant of their appearance in actual force. In short, one would arrive at the absurdity of making the intrinsic sense of a maxim depend upon the extrinsic and accidental fact of its approbation and observance.

Those who accept the doctrine of the essentially positive character of Right are accustomed to point out this characteristic as a criterion of distinction between Right and morals. But it is exactly this application of the doctrine, which, if it were true, would have supreme importance, which shows instead its irremediable want of foundation. Because morals themselves have also a historical and positive existence; and the problem, whether they have this existence alone or have also a metempirical character, arises in their case not less than in that of Right. He who affirms —for example, with Ahrens—that morality is absolute and invariable, but Right relative to time and place, commits

in our opinion, a twofold error: since, on the one side, he forgets that the principle of historical relativeness is applicable to moral, in the same manner as to juridical, phenomenology, and, on the other hand, disregards the fact that a moral absolute is not possible without a corresponding juridical absolute.

That all Peoples have their own "positive morality" in harmony with their own system of Right, and therefore subject to an analogous development, is a truth which stands in no need of demonstration, especially after modern investigations into this subject. In reality, both kinds of determination have a meeting ground, and are compounded into a concrete ethical organism or regulating system, which is precisely the product and the historical exponent of the predominating convictions regarding modes and ends of conduct. The rules of both the one and the other species have, however, differing characters, inasmuch as they correspond to the two fundamental points of view according to which conduct is capable of being regarded. Right concerns, as we have said, the objective ordering of activities, and affirms itself where a collision between the actions of several persons is possible, marking the limits of their respective effective claims. But morality furnishes a rule in another sense, and tends to resolve the clashing between two different actions which one and the same person can carry out. Moral precepts are therefore subjective or one-sided, since, even if they have also a relation to other persons, they really determine only the conduct of him who ought to execute them; while juridical precepts are essentially objective or two-sided, because they signify always a correlative determination of the conduct of a multiplicity of persons. From this different logical nature of the one and the other category, follows the difference which we find in their expressions and sanctions; that is, in the varying manner in which the juridical and the moral

rules make their force felt, even when it is in the same manner that they are recognised and observed. Such difference cannot, however, prevent us from recognising that there is in every human society a morality in force, which reveals itself in custom, and is historical and relative, like the Right which springs from and is developed along with it.

No distinctive criterion is then afforded by the mere fact of "positiveness," unless from that we ascend to the intrinsic meaning of the rules set or followed. Considering this meaning, we perceive that Right and morality have, although each in its own way, a mode of existing—or rather of appearing—in the sphere of experience; but in themselves, as forms of evaluation of work, they are both ranked above this sphere, and denote a duty to be a deontological exigency. Thus, then, both morality and Right express, if at different visual angles, an ideal of conduct that can be violated physically, without on that account ceasing to have its value as ideal.

No one doubts that, in a given system, the legal rule remains such, whether in fact infringed by some or not. The transgression falls logically under the rule, and does not destroy it; right violated withdraws itself from the action of violence—Rosmini has well remarked—like an immortal existence, inaccessible to all material power, which does not succeed as much as in touching it. In this hyperphenomenal value resides properly the truth of Right, which, analogously to that of morality, does not depend on facts, but rather tends to impose itself on them; whence neither can it be limited by the institutions actually in vigour, of whatever kind they may be; rather it sets its affirmations naturally beyond these, and sometimes against them. This same positive Right, inasmuch as it represents a reality of fact, is subjected to an evaluation *sub specie juris*, that is, it is liable to be referred to a criterion of justice, independent of every historical sanction. This

criterion persists in the human conscience, and is one and uniform in its principles, on which it proceeds gradually to unfold itself. Though the juridical vocation of the conscience is reflected in the institutions which succeed each other in history, still it is not exhausted. Nay, the development of these institutions would not be possible if no new Right could ever be opposed to that already established: that is, there would not exist that natural jurisdiction which the conscience exercises in an autonomous fashion on the objects already contemplated by the judicial and positive arrangements, and therefore on those arrangements themselves.

The antithesis between the natural and the positive Right, between the "φύσει δίκαιον" and the "νόμω" or "θέσει δίκαιον," on which the classical philosophy of Right is in all its developments concentrated, expresses exactly this fundamental law of our being, this necessity of a refraction of the absolute in the relative. It has been in vain attempted to eliminate the antithesis, dogmatically denying its first term, or ending in its confusion with the second. The exigency of natural Right persists, notwithstanding the denials of positivists and the attenuations of equivocal "historism"; it persists, in spite of the much more harmful errors of the very persons who advocate it with an inadequate apparatus or by improper methods. Natural Right exists, that is, it is valid, because the human being exists and must be reckoned with, whose inseparable attribute it is; and its determinations are drawn simply from the examination of human nature itself, which reason can perfect, bending back upon itself: "*ex ratiocinatione animi tranquilli*," to repeat the formula of Thomasius.

The dogma of the essential "positivity" of Right is thus dissolved by criticism. We see that "positivity" is nothing else than a transient and superficial image of a more profound truth. The analysis of the process which leads to the

imparting on the stage of history of a "positive" quality to Right, obliging us as it does to recognise in the process itself only a "*consecutivum*"—a purely secondary result—in respect of the *idea* that is thus rendered positive, confirms in an indirect but undeniable manner, the legitimacy of the deduction of pure Right as an ideal conception.

GEORGE DEL VECCHIO.

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## IV.—JUDICIAL STATISTICS, ENGLAND AND WALES, 1911.

### PART I.—CRIMINAL STATISTICS.[1]

THE Criminal Statistics for the year 1911 do not appear to contain any features of special interest. It is not to be expected, in the ordinary course of events, that the conduct of the population of England and Wales will change violently, either for better or for worse, in the course of twelve months, and as statistics of crime reflect the conduct of the population in relation to the criminal law, it is not likely that the statistics for any given year will differ considerably from those for the preceding year. There may, it is true, be variations in detail due to special causes, but on the whole the differences cannot be expected to be large. The present volume is the fifty-fifth of the series, and therefore, as it does not chance to mark a jubilee or centenary, it does not afford a plausible pretext for an examination of the statistics relating to crime over a considerable period of years. Our remarks will accordingly be restricted to the principal Tables in the volume, and if this is somewhat open to criticism as a dull proceeding, the

[1] *Judicial Statistics, England and Wales.* Part I.—Criminal Statistics. London: Wyman & Son. 1913.

critic may be invited to exercise his ingenuity in devising a numerical system in which the number 55 would as speciously mark an epoch as the number 50 in the decimal system.

The statistics are in the same form as those for 1910, and they contain six comparative Tables (pages 19—25), and fifty annual Tables for 1911 (pages 31—163). The first five of the former Tables give comparative figures for the period 1893—1911, with regard to (i) the number of persons for trial at Assizes and Quarter Sessions and the nature of the offences, (ii) the number of persons tried for indictable offences at Courts of Summary Jurisdiction and the nature of the offences, (iii) the number of persons tried for indictable offences at Assizes and Quarter Sessions and summarily, (iv) the number of persons tried summarily for non-indictable offences and the nature of the offences, and (v) the number of crimes (indictable offences) reported to the police; the sixth Table contains a summary of the preceding five, with the proportions of persons tried and of crimes to population from 1857 to 1911. The fifty annual Tables give the details for 1911 in regard to proceedings at Assizes, Quarter Sessions, and Courts of Summary Jurisdiction, and figures in regard to probation orders, extradition and fugitive offenders, public prosecutions, police returns of crime, coroners, prisons, Borstal institutions, reformatory and industrial schools, places of detention (provided under the Children Act), criminal lunatics, habitual drunkards, and the exercise of the prerogative of mercy.

The statistics, as usual, divide offences into three main classes: indictable offences, *criminal* non-indictable offences, and other non-indictable offences. The first class comprises all the offences for which a man has a right to trial by jury, though, of course, only about one-fifth of them are actually tried on indictment: the second class includes

offences involving some element of dishonesty, fraud, violence, or cruelty: the third class includes all the minor offences of the criminal law. The figures[1] for 1911 for each of these three classes are 62,318, 74,492, and 560,653 respectively—a grand total of 697,463. The corresponding figures for 1910 were 66,389, 73,105, and 558,811: and the grand total for that year was 698,305. On these figures the total volume of crime for 1911 was practically the same as in 1910, the difference being so small as to be negligible. It is, however, usual to regard the statistics relating to indictable offences as the best index to the movements of crime, and arguing from these figures, we find the satisfactory conclusion that serious crimes in 1911 showed a decrease of 4,071 as compared with 1910, the figures being 62,318 and 66,389 respectively. The figures for the three years 1908–10 were, however, unusually high, as in 1908 the number jumped from 61,381 to 68,116, with decreases of roughly one thousand in each of the two following years. With two exceptions (1868 and 1882) the figures for 1911 are larger than in any year previous to 1908, but, when we allow for increase of population, the figures for 1911 show the smallest recorded proportion of offences to population, except during the period from 1895—1901, and 1906. The proportion for 1911 is 172 offences to 100,000 of the population, as against corresponding figures of 185, 190 and 194 for 1910, 1909, and 1908; and though the number of offences in 1911 was greater than that for 1907 by about 1,000, the percentage to population is smaller by 5—172 compared with 177. It is satisfactory, therefore, to note that there has been a steady decrease in serious crime since 1908, the largest decrease, as compared with 1910, being in the number of offences against property. The lat[illegible] point might perhaps be used as an argument in supp[illegible] the theory that crimes against property decrease as g[illegible]ral

[1] These figures relate to the number of persons tried.

prosperity increases—and certainly the evidence is that trade has been good and employment plentiful of late. But we forbear to discuss here the vexed question of whether crime is to be ascribed as much (or more) to the pressure of circumstances on the individual as to the free choice of the criminal. It is of course tempting, when dealing with matter so abstract as statistics, to connect variations in the figures with impersonal causes, and it is sobering to reflect that after all statistics on so large a scale as those in this volume can only be obtained by regarding each separate offence as a mere unit and by disregarding the thousand and one details which distinguish one unit from another in actual fact. Statistics are necessary, but they are not a substitute for life.

Turning in detail to the various classes of indictable offences, we find that offences against the person increased by 211 from 1910, the totals being 2,942 and 2,751 in 1911 and 1910. It is pointed out in the Introduction that the principal headings under which this increase occurred are manslaughter, endangering railway passengers, malicious wounding, intimidation, and molestation. The increases in all these four heads amount to 159, and it is suggested that there is probably some connection between them and the fact that labour disputes were prominent in 1911. Additional confirmation of the suggestion may be found in the fact that cases of assault tried summarily showed an increase for the first time for many years. Last year we called attention to the steady decrease in the figures relating to assaults. The annual average for 1896—1900 was 71,077; for 1901–5, 58,379; for 1905–9, 49,133, while the figures for 1910 were 42,647. In other words, there had been a decrease of something like 30,000 in 15 years. In 1911, however, the total rose from 42,647 to 44,748, and probably the same causes led to an increase in the number of cases of intimidation summarily heard (from 86 in 1910 to

192 in 1911) and in the number of orders to find sureties to keep the peace (from 14,963 in 1910 to 16,147 in 1911). The figures for the total of sexual offences show practically no change from those for 1910, the number for the latter year being 1,435 and for 1911, 1,440. The number of cases of rape falls from 102 to 62, while that of indecent assaults rises from 669 to 780. The latter rise, is, however, ascribed in the Introduction to a change of procedure provided in the Children Act of 1908, which extended the powers of justices for dealing summarily with such cases, and thus led to cases being so dealt with which otherwise might have been treated as common assaults. The change in the figures of summary cases is striking; the total was 37 in 1908, 232 in 1909, 415 in 1910, and 543 in 1911. The total of indictable offences against property shows little variation, but that in the right direction; the number is 3,964 for 1911, as against 4,137 for 1910. A small rise in the burglary figures is compensated for by a reduction in the housebreaking figures; while cases of shopbreaking fall by about 150. Offences against property without violence show a decrease as against 1910 of about 4,000, the decrease being almost entirely in the number of larcenies. Arson shows an increase from 176 to 201, but, probably the variation is casual, the numbers in the last five years ranging between 140 and 200. Forgery remains steady at about 240, while the figures for uttering counterfeit coin, which jumped last year from 121 to 171 are down again to 127, which is about the average for the last five years.

We come next to the figures for non-indictable offences, *criminal* in character. Under this heading are included such offences as (1) assaults, including aggravated assaults, assaults on police and common assaults; (2) brothel-keeping; (3) cruelty to children; (4) malicious damage to animals, fences, trees, &c.; (5) unlawful pledging; (6) unlawful possession; (7) stealing workhouse clothes; (8) offences under

the Prevention of Crimes Acts; (9) stealing animals, fences, trees, shrubs, fruit, &c., and receiving such things when stolen; and (10) such offences under the Vagrancy Acts as frequenting, being found in enclosed premises, &c. The total number of persons tried for these offences in 1911 was 74,492, as against 73,105 in 1910, and an annual average for 1906–10 of 77,952. There is thus a small increase as compared with 1910, but this is much more than accounted for by the increase of about 2,000 in the number of assaults as compared with 1910—this increase being due probably to exceptional causes. It is satisfactory to note that the figures for this second class are on the whole decreasing steadily—from 98,520 in 1901 to 74,492 for the current year of the statistics—the decrease being mainly in the number of assaults. The number of persons tried for brothel-keeping falls from 1,238 in 1910 to 1,050 in 1911, while the numbers in relation to living on prostitutes' earnings fall from 470 to 451. It will be interesting to observe in future statistics how these figures are affected by the attention which has of late been drawn to these matters in connection with the White Slave traffic, and which found expression in recent legislation.

The remaining non-indictable offences are not criminal in the most serious sense of the term, and consist mainly of breaches of municipal regulations established in the interests of public safety, health and comfort, and not involving violence, cruelty, or gross dishonesty. The total for 1911 is 560,653 and for 1910 it was 558,811. The result is, therefore a slight increase, but it is much more than explained by an increase of something like 10,000 in the figures for drunkenness. Some points of interest may be noted. Thus, offences against the Elementary Education Acts remained fairly steady at 36,925. In 1900 the number was 89,657, and that number fell progressively to 38,951 in 1909. In 1910 it was 36,823, and thus the figure for 1911 is a slight

increase, the first for 12 years. Motor car offences show an increase from 12,366 to 13,464. As regard drunkenness, the increase by about 10,000 brings the total of 1910 up to roughly 186,000. It will be recollected that the summer of 1911 was abnormally hot, and the concurrence of increases both in temperature and drunkenness suggests interesting speculations. The number of persons tried for Sunday trading shows an increase from 6,895 to 7,470, while the offenders against the Vaccination Acts continue to dwindle in number, the total of 361 for 1910 having fallen to 212.

Turning to Tables I—X, which relate to proceedings at Assizes and Quarter Sessions, we find that 4,105 persons were brought up for trial at Assizes, and 8,838 at Quarter Sessions, a total of 12,951. The corresponding figures for 1910 were 4,053 and 9,626, giving a total of 13,680. The figures for 1911, therefore, show a tendency to revert to those for 1907, the year before a large increase occurred in the total of indictable offences. Of this total, 12,951, 12,698 were actually tried, with the result that 2,015 were acquitted, 10,646 convicted, while 37 were found guilty, but insane. It is a striking fact, that roughly, one person in every six who are tried on indictment is acquitted. More than one-quarter of the total number of convictions occurred at the Central Criminal Court and the London Sessions—the figures for these Courts being 2,713. The population over which these Courts have jurisdiction is 4,521,685 in number. It is interesting to observe, that in Lancashire, for example, with a population of 4,799,690, the number of convictions was 1,083—much less than half the number for the County of London.

Of the 10,646 persons convicted, 7,474 had been previously convicted, and it is pointed out in the Introduction that in the past 11 years (which covers the adoption of the use of finger-prints) the proportion of persons convicted who are recognised as having previous convictions has risen

from 60 per cent. to 70 per cent. We may note here, that 57 persons were sentenced to preventive detention under the Prevention of Crimes Act, 1908, in 53 cases the sentence being combined with the minimum term of penal servitude (three years). In 1910, the number of persons sentenced to preventive detention was 178, so that the drop is very considerable.

Table X contains the statistics of the work of the Court of Criminal Appeal. There were 623 applications for leave to appeal, of which 109 were granted. In addition to this, 41 appeals were made on grounds involving questions of law, 11 with the certificate of the Judge who heard the original trial, and four appeals against sentences of preventive detention. There were thus 165 appeals for hearing, and in 104 cases the conviction or sentence was upheld. In 25 cases the appellant was discharged, and in 35 cases a new conviction or sentence was substituted. When it is remembered that the Criminal Appeal Act applied to more than 10,000 convictions in 1911, the small number of appellants who were restored to liberty by the Court—twenty-five—is evidence of the satisfactory administration of justice in the Courts generally.

Tables XI—XVI relate to proceedings at Courts of Summary Jurisdiction. The number of persons tried by these Courts in 1911 was 684,512,a decrease by 113 from the total for 1910. Of this total 79,830 were discharged; in 76,584 cases, though the charge was proved, the Courts did not actually convict; and in 528,098 cases there were convictions. In 8,868 cases the offender was placed under the supervision of a probation officer, and 2,605 children were sent to Industrial Schools; while 1,118 boys and girls were committed to Reformatory Schools. In 73,150 cases sentences of imprisonment, without the option of a fine, were awarded, while in no fewer than 446,596 cases—or roughly 11 out of every 13 convictions—a fine was imposed. Of

this last number about 81,000 went to prison in default of payment; and it is therefore obvious that the adoption of measures which would reduce the number of those who go to prison instead of paying a fine, would be of great benefit. The present position is that about one-half of the total number of convicted prisoners received into prison are admitted in default of a money payment, and any considerable reduction of this proportion would not only save many from familiarity with prison, but would effect economies in the cost of prisons and also swell the funds into which fines are paid.

The work of the Courts of Summary Jurisdiction is not of course entirely confined to criminal matters, and it is interesting to observe by quoting a few details in what varied ways the Courts are concerned in the affairs of the community. For the maintenance of wives 7,468 orders were made, and 3,185 orders were made under the Poor Law Acts for the maintenance of families, relatives, etc. No fewer than 16,832 orders were issued for the possession of small tenements, 2,187 orders for dealing with nuisances under the Public Health Acts, and 3,368 orders for the payment of wages.

It is of course a common complaint that the law is costly, and that appeals are a luxury open only to the well-to-do. At the same time it is significant that the number of appeals against summary convictions was only 104. More than one-third of them—38—were in respect of convictions under the law relating to intoxicating liquors. Fifteen were in respect of motor car offences, and six in respect of adulteration. It is a fair presumption that in these 59 cases the appellants were not poor people or that the ultimate consequence of the conviction entailed substantial loss. Of the 104 appeals, in 70 cases the conviction was affirmed, while in 30 cases the sentence was varied, and in 28 cases the conviction was quashed.

Table XVI affords information as to the proceedings in Juvenile Courts, established under the Children Act 1908. Shortly, the Act provides that charges against children under 16 shall be heard in a separate Court from the ordinary Court, or on a different day, or at a different time from the usual sessions. The public generally are not admitted, though of course the Press has a right of entry. The total number of children brought before the Juvenile Courts in 1911 was 32,977. One of the principles underlying the Children Act is the enforcement of the responsibility of parents for their children, and, as a rule, parents are required to attend when their child is brought before the Court. Though no doubt very often the proceedings end in nothing much more serious to the child than a lecture from the Court, it is probable that the inconvenience to which parents are put in having to attend frequently results in the inculcation by them upon the children of the necessity of conformity to the law. This result would very likely be the more firmly secured in the 1,424 cases in which the child's parent or guardian was ordered to pay the fine imposed.

The system of probation is now becoming a familiar feature in our criminal administration. It had of course long been the practice for Courts to bind an offender over to be of good behaviour for a given period, and the change introduced by the Probation of Offenders Act of 1907 was to secure that the Courts should have adequate means of judging whether an offender so treated profited by lenience. By placing an offender for a given period under the supervision of a probation officer, who is required to report to the Court from time to time on the conduct of his charge, and to assist him generally, the Court retains its hold over an offender, who knows that it is not a matter of indifference whether he behaves ill or well during his probation period. The Act became law in 1907, and the number of probation orders made in 1911 was 9,516. This figure is a decrease

from the total of 1910 by about 700, but is about 600 in advance of the total for 1909. Only 593, or 6 per cent. of the offenders placed under the care of a probation officer were brought before the Courts for a breach of the conditions of the order, and though it is not unlikely that for one reason or another there is some remissness here and there in taking prompt action against an offender who has abused the chance given him, it is encouraging that the proportion is so small. Many of those placed under probation would no doubt but for the Act have been committed to prison, and it is very satisfactory that more humane methods of dealing with offences, such as are possible under this Act, do not show any signs of leading to untoward results. The efficient administration of the Act does undoubtedly cause additional work to the Courts. Instead of ending the matter at once either by dismissing the offender or by fining or imprisoning him, the Court retains an interest in him for, it may be, three years, and the scrutiny of the periodical reports on him involves labour. This, however, is the inevitable result of all attempts to deal individually with persons, and there can be no doubt that the labour so spent is amply justified by results.

The remaining Tables do not call for any special attention, and there is little to note which distinguishes them from Tables for preceding years.

There is a famous passage in Gibbon which depicts the far-reaching power of the Roman Emperors and the futility of attempts to escape from it on the part of those who had reason to fear the Imperial wrath. So far as criminal offences are concerned, the fugitive from one country to another must experience something of the same alarms when he reflects on the existence of the powers of extradition. No doubt it is a consolation to know that the machinery of extradition involves delay and expense, but still it must be a potent factor in the choice of an asylum, if to its other

charms are added the absence of or the special difficulty of exercising powers of extradition. In 1911 there were 50 applications for extradition from this country to other countries, 19 being from Germany and 13 from France, and conversely, there were 10 applications made by our Government.

The number of prosecutions undertaken by the Director of Public Prosecutions—554—shows a decrease of about 50 from the previous year; of these cases 120 were capital cases, and 57 were cases of incest.

In the police statistics it is of interest to observe that the ratio between the number of indictable crimes reported to the police and the number of persons apprehended or summoned for them is highest in the case of crimes against the person. In 1911 there were 4,185 such crimes reported, and 3,699 persons were proceeded against. As might be expected, the ratio is smallest in the case of offences against property with violence: 12,294 such crimes were reported, while the number of persons proceeded against was 4,397. Such crimes as burglary, housebreaking and shopbreaking, are ideally carried out in the absence of witnesses, and are the special province of the expert; while on the other hand crimes of personal violence are frequently due to momentary loss of self-control by decent people, and pre-suppose the presence of at least one other person. Of the 13,165 persons who were sent for trial at Assizes or Quarter Sessions, bail was allowed to 2,976, roughly 22 per cent. This is about the average proportion during the last 12 years. It appears from Table XXXIX that 1,032 persons acquitted after trial on indictment had been detained in prison before trial, and that of this number 240 were detained between 4 and 8 weeks, 120 between 8 and 12 weeks, 66 between 12 and 16 weeks, and 16 over 16 weeks. Singularly little is heard of this failure of speed in the working of the system of justice, though it is not likely that the persons thus

detained and afterwards acquitted all fall into the class of those who are wrongfully acquitted, and so think themselves well out of a bad business, or into the class of those who are innocent but have no desire to revive the past.

The prison statistics show that the total number of convicted prisoners received into prison was 159,747, and it has already been noted that more than half of this total were committed in default of paying a fine. The fact that 107,209 prisoners were sentenced to hard labour shows that a large proportion of those committed in default of paying a fine underwent hard labour. It is a curious thing that persons in whose case a fine is deemed adequate in the first instance should be ordered to undergo hard labour, and one may suspect that there is a mechanical imposition in some cases. Forty-seven offenders were ordered to be detained in the first division and 1,650 in the second division. This latter figure shows a substantial decrease from the figure for 1907, which was 2,504; and it is difficult to believe that of the 160,000 persons sent to prison only 1,650 were fit to be placed in the second division.

As regards the length of sentences, we observe that 35 per cent. of them were for one week or less, and 26 per cent. were for more than one week but less than two weeks. The difficulties of prison administration, especially in regard to the provision of suitable work, may be imagined, in view of the fact that more than half of the total number of prisoners are committed for less than a fortnight—in fact, more than one-third for less than seven days. It is, perhaps, worth while to add that about one-third of the total number of persons imprisoned were convicted of drunkenness.

If any proof were needed that education and conduct improve together, it might be found in Table XXXVIII, which shows that of the 160,000 convicted persons in prison, 20,000 were illiterate, and 66,000 could read and write only imperfectly.

The most hopeful method of dealing with young offenders who are on the high road to a life of crime is the Borstal system—which roughly means that the offender is caught young, sentenced to a substantial term of detention (three years being the maximum) and put through an efficient course of training and discipline. When released, he is released on licence and is looked after on his discharge by the Borstal Association. There was an increase of nearly 100 in the number of youths and girls committed to Borstal institutions in 1911 as compared with 1910—the figures being 465 youths and 50 girls; of these 432 had been previously convicted.

We may end with a reference to the statistics relating to the exercise of the prerogative of mercy. Of 31 persons sentenced to death, 13 had their sentences commuted to penal servitude, for life in the first instance. Four free pardons were granted, and remissions of terms of penal servitude or imprisonment or of other punishments were granted in 201 cases, whilst 63 persons under sentence of penal servitude were released on licence earlier than would have been the normal time, under the rules regulating the grant of licences. The total thus reached is 285, and only in five cases was the remission granted on grounds affecting the original conviction.

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## PART II.—CIVIL STATISTICS.[1]

These Statistics present no very new or striking features. The results are summarised by Sir John Macdonell at the conclusion of his Introduction as follows:—"(1) A considerable decrease in the total proceedings begun in all Courts; (2) A decrease in the total actions heard and

[1] *Judicial Statistics, England and Wales, 1911.* Part II.—Civil Judicial Statistics. London: Wyman & Sons. 1913.

determined, etc., in all Courts; (3) A decline, on the whole, in the business of the High Court and the County Courts; (4) A slight decline in the actions disposed of in the Chancery and King's Bench Divisions; (5) A slight increase in the civil business on circuit; (6) An increase in the petitions presented in matrimonial causes."

The numbers of the total proceedings in all Courts show a substantial reduction of over 53,000; that is from 1,475,422 to 1,421,691. This is almost entirely due to the decrease in the numbers of County Court proceedings, which have fallen from 1,363,747 to 1,313,145, or over 50,000. There is a slight but steady decrease on the total proceedings as compared with the population, the figures being per 100,000: 3,959 in 1911; 4,122 in 1910; and 4,271 in 1909. Sir John Macdonell generally provides some food for speculation by giving us statistics of facts which possibly may influence the volume of litigation. Last year he suggested that possibly the figures of litigation might be affected by the state of employment and trade, and gave figures as to increase of wages, etc. He also suggested that the fact that large numbers of work-people were involved in trade disputes might have produced some effect. If there was any foundation for this last suggestion the cause must have operated with increased power in 1911, as there were "no fewer than 903 disputes of an aggregate duration of 10,319,591 working days begun in 1911, involving directly and indirectly 961,980 work-people as compared with 531 disputes in 1910, of an aggregate duration of 9,894,831 working days, and involving 515,165 work-people." The corresponding figures for the year 1909 being 436 disputes, 2,773,986 working days, and 300,819 work-people respectively. Other facts given as possibly material are the decline in crime, 172 per 100,000 of population being tried for indictable offences, as against 185 in 1910, and a smaller proportion of persons in receipt of poor relief, *i.e.*, 21 per 1,000 against 24·6 per 1,000.

Possibly the Old Age Pension Act may have had something to do with this last reduction.

If we examine the figures of the Appellate Courts we find an increase in both proceedings begun and in appeals, etc., heard and determined. These figures do not always correspond, as for instance in those of the Judicial Committee of the Privy Council, for though the proceedings begun in 1911 were 14 fewer in 1911 than in 1910, being 128 against 142, yet the appeals, etc., heard were 29 more in number, being 93 to 64. The business in the House of Lords was almost identical in the two years, the proceedings begun being 90 and 87, and the appeals, etc., 72 and 74. Again, although there was a substantial increase in the proceedings begun in the Court of Appeal, the figures being 862 to 814, or an increase of 48, the appeals, etc., heard and determined were practically the same, being 641 to 645.

The statistics of the appeals to the Judicial Committee, show that in 1911, the largest part of the business came from India. There were 77 Indian appeals, against 47 Colonial, and of the latter 22 were Canadian. In looking at the past history of the Judicial Committee, it is interesting to notice the remarks of the learned Editor on the position of the West Indian Islands. "In the early part of the last century, the majority of appeals came from the West Indian Colonies, particularly Jamaica. In 1814—1826, no fewer than 100 appeals came from that Island, in 1827—1832, 31. In the last 10 years, the number of appeals from Jamaica was only five." It will be remembered, that colonial slavery was abolished in 1834. It would be interesting, if we had the figures of appeals from India and Canada for the first half of the last century, to compare with the West Indian figures. It would not be a bad test of the gradual rise in prosperity of the various Colonies and Dependencies. The results of the cases determined were, that in 56 cases the judgment was affirmed, in 34 reversed, and in three varied. The

Indian Courts were rather more successful in keeping their judgments than the Colonials; as in the former cases, there were 30 affirmed to 17 reversed, while in the latter, there were 22 to 17. The principal features of the business of the House of Lords, were the number of peerage claims and the large number of appeals from the Court of Session. There were no less than seven claims before the Committee of Privileges, whereas, the average for the nine previous years, is 0·66. We must add, that not one of these claims was decided within the year, and that one claim, the Earldom of Airth is still pending, the petition in which was presented in 1906. It is curious that there should be so large an increase in the claims to peerages, when recent legislation has rendered the enjoyment of that dignity so much less desirable. The results of the appeals from the Court of Session, to a considerable extent justifies the judgments of those who brought them, and may, perhaps, contribute to a continuance of this increase, as out of the appeals from the Court of Session finally adjudicated on, nine were affirmed and 13 reversed. The corresponding figures for the Courts of Appeal of England and Ireland, were 36 affirmed to 11 reversed, and two affirmed to none reversed. A marked feature in the work of the Court of Appeal, are the large number of appeals from County Courts, being appeals under the Workmen's Compensation Acts; these composed no less than about a quarter of the final appeals set down, being 164 out of 619. Sir John Macdonell calls special attention to the fact, that "from the passing of the 1897 Act, down to the end of 1911, no fewer than 1,394 appeals from the decisions, under these Acts, of the County Court judges have been entered in the Court of Appeal," and considers that, "probably, no other statute has in a like period been the source or occasion of so much litigation." The legislation of the year 1906 considerably increased the number of appeals. The number of appeals under these Acts, set down

in 1911, is the highest on record. In the cases disposed of, the judgment was affirmed in 61 and reversed in 38 instances, and besides, there were six new trials ordered.

On comparing the results of appeals from the Chancery Division and the King's Bench Division, we find a considerable difference in favour of the Chancery judges. Out of the appeals from judgments and final orders, the Chancery Division shows 70 affirmations to 15 reversals, while the King's Bench Division figures are 112 to 64. Under appeals from interlocutory orders, we again find that the Chancery Division has 24 orders affirmed to 10 reversed, while the King's Bench Division has 70 orders affirmed, against no less than 69 reversed. The statistics of the Chancery Division show that the steady decline which has been noticed of late years still goes on almost continuously. The actions set down for trial were 610, an increase on 1910 of 34, but the number set down in 1902 was 1,060. The result is shortly summed up by the Editor—"In 1911, there was again a decline in the causes or matters begun, the proceedings begun (5,766 against 6,006), being the smallest yet recorded. There was also a decline in orders made at Chambers (12,476 against 12,686), in actions heard and determined (434 against 449), in the number of taxations (3,711 against 3,784), in the amount of fees brought in (£774,254 against £826,502), in fees received (£40,875 against £42,847); in other words a decline under all the above heads."

In the King's Bench Division there is again a decline, though a slight one, under nearly every heading. Proceedings commenced fall from 61,899 to 61,822, but actions set down for trial increase by seven, being 3,078 to 3,071. Actions, tried or otherwise, disposed of are a few less, 2,068 to 2,074. The figures all through are very nearly the same for the two years, showing mostly slight decreases with here and there a small rise. For instance, writs, etc., fell from 61,899 to 61,822, and judges' summonses from 1,538 to

1,478; but masters' summonses rose from 27,695 to 27,883. It is remarkable what a small proportion of the amount recovered in legal proceedings is the result of a trial. In the King's Bench Division, the amount for which judgments on money claims were entered was £5,515,957; of this over two millions and a-half were attributable to judgments entered in default, and nearly two millions for summary judgments under Order XIV, and only £218,988 and £279,111 were for judgments entered after trial with jury and without jury respectively. A fair idea of the importance of the business may be formed from the fact that, out of a total of 27,448 judgments entered, 1,554 were for amounts under £20, 16,530 for £20 and upwards not exceeding £100, and 7,702 for above £100. The number of judgments entered in the Central Office is about double that in District Registries.

On circuit there was an increase in the civil business, 891 causes being entered, and 681 disposed of, as against 822 and 646 in 1910, but the amount recovered was very much the same, being £105,942 against £104,819. The Northern Circuit has by far the largest amount of business, the actions disposed of numbering 253 and the amount recovered being £47,076. The Midland and North-Eastern almost tie in the number of actions disposed of, having 101 and 103 to their credit respectively. It is curious to see how very even the amounts recovered by the Midland, Oxford, North-Eastern, and South Wales Circuits are, the highest being £13,160 and the lowest £11,414. The position of the Oxford and South Wales Circuits are mainly due to the substantial results of the Summer Assize, the amounts being £11,133 and £8,747 respectively, the former being due to no less than £10,000 being recovered though only two actions were disposed of. The usual list of Assize towns where not more than five actions were entered is given.

It is interesting to look down the Table which gives the amounts recovered on verdict or judgment in actions tried

in London and Middlesex, on circuit, and before Official Referees. The actions are subdivided into 51 heads, but the amounts vary so from year to year that no very reliable deductions can be drawn from them. If we take some of the largest, we find that, under "goods sold and delivered," the amount is £21,714 against £42,797 in 1910, for "money paid," etc., £61,312 against £101,201; for "Libel" £36,947 against £26,335; for "Taking Accounts," £10,655 against £561. The greatest discrepancy, however, comes under the head of "Fraudulent Misrepresentations," where the amount recovered reaches the high figure of £118,185, against £15,531 in 1910. The result of recent legislation is shown in the increased activity of the King's Remembrancer's department. Although the number of English Informations filed fell from 13 to six, the writs of *subpœna ad respondendum* rose from 1,256 to 2,064.

Sir John Macdonell's criticism of the increase in the number of examinations of debtors is worth noting. After stating that the number had risen to 720, he goes on to say: "They are, it is believed, generally useless for purposes of securing information as to the debtors' means. Very rarely does the judgment creditor elicit at the examination facts which enable him to realise the fruits of his judgment."

The Editor deals with the Probate, Divorce, and Admiralty Division (Divorce) with less detail than usual. The petitions for divorce have increased considerably, numbering 859 to 755, and the petitions for other remedies have also increased slightly; there being 81 petitions for judicial separation against 58; 43 for nullity against 26; and 90 for restitution of conjugal rights against 69. The total of petitions is 1,073 against 909. The total of suits for trial has risen from 915 to 1,253. An unusually large number of suits were withdrawn or otherwise disposed of out of Court,

being no less than 154 against 42, and at the end of the year the large number of 340 suits were pending. "The total number of decrees was at the rate of 3·91 per 1,000 marriages. The average duration of the 1,073 unhappy marriages, in connection with which petitions of some sort were presented is calculated by the Editor to be 11·5 years. The figures as to husbands' occupation are, we are glad to say, once more to the credit of barristers, as they only figure three times, this being half the number of the clergymen. The number of separation orders granted by magistrates has slightly increased, having risen from 4,819 to 5,170. It has not, however, recovered the set back it is supposed to have received from the decision in *Harriman* v. *Harriman.* The numbers in the different counties vary very much. Merioneth and Montgomery have no cases at all. Hereford, Huntingdon, London City, Rutland, Cardigan and Radnor have only one each. On the other hand, Lancaster heads the list with 1,287, followed by the Metropolitan Police district with 1,000. The largest number in proportion to the population is Nottinghamshire, which has 183 orders to 604,098 inhabitants. The number of Probate actions diminished considerably. There were 192 writs of summons issued against 237, and though there were 312 motions against 276, there were only 632 summonses against 687. Both the number of actions for trial and the numbers disposed of were smaller, the former being 98 against 116, and the latter 74 against 119, yet the Court sat 253 days against 248. The grants of Probate and Letters of Administration increased by nearly 2,000. The net value of the estates admitted to Probate was £236,253,253, an increase of just about six millions, yet the payments for Death Duties were between £400,000 and £500,000 less, being £21,544,497, against £21,996,836. Bankruptcy proceedings were much the same as the year before, although a few more petitions were filed, namely, 5,172 to 5,159, yet the total of Receiving Orders

was less, 3,719 to 3,858, and the Orders for Administration of Judgment Debtors' Estates were nearly 400 less.

Table XXXVIII contains an unusual number of Parliamentary election petitions. These were eleven in number. The costs in these cases were very heavy, though a considerable portion in every case was taxed off. For instance, after one petition in which the respondent was successful, his costs were brought in at £13,571, of which £6,800 was allowed. In another case, petitioner's costs were brought in at £6,392, of which £3,229 was allowed. There was no Municipal election petition.

In County Court proceedings commenced there was, as mentioned at the beginning of this notice, a falling off of a little more than 50,000. There is a slight discrepancy between the numbers given in the Table on the first page of the Introduction and in Table LXVI, but taking the figures in the latter, the total number of proceedings commenced was 1,314,564 against 1,365,185, and this in spite of the additional duties from time to time devolving on the County Court judges. In view of the movement for extending the jurisdiction of County Courts, it is worth noticing that there is no increase in the number of plaints entered for amounts above £100. The figure for 1911 was 493 and for 1910 was 488, this is also well below the average of 1907–11, which was 592. It is rather curious that the number of actions determined on hearing and of those struck out or otherwise disposed are so near each other; the former being 430,518 and the latter 434,888; while 411,840 were determined without hearing. The number of actions disposed of was 63,000 less than in the previous year, so that, as there were 98,000 cases pending at the end of the year, it looks as if, in spite of the falling off in the number of proceedings commenced, the County Court judges had still more work than they could get through. The number of days the Courts sat is one less than the year before. The

cases under the Workmen's Compensation Acts rose again from 6,815 to 8,120, and the Memoranda registered from 21,101 to 23,101. As might be expected, the consequence was that the amount of compensation awarded, both in lump sums and weekly payments, has risen substantially, the amounts in arbitrations being £256,347 in lump sums, and weekly amounts of £863 against £209,775 and £823. In Memoranda registered the lump sum was £574,422 against £502,835, but the weekly amounts were a trifle less, being £4,261 against £4,316. The learned Editor, in his Introduction, deals with the decline in County Court business in some detail. He gives a list of 11 circuits with decreases of 2,000 and upwards; of these Birmingham heads the list with a decrease of 7,497. He points out "that the decrease appears equally in the figures for the agricultural districts and in those for manufacturing centres." In some cases it appears as if the decrease might be accounted for by serious labour troubles in the neighbourhood, but the learned Editor confesses himself quite unable to offer any explanation of the increase of 3,836 plaints on the Durham Circuit. He quotes part of a communication from the Registrar of the Birmingham County Court, who suggests that the main reason for the decrease in Birmingham is "that the industrial credit trade is not being pushed among the working classes here to anything like the same extent as was the case five or six years ago, as traders have realised that it cannot profitably be carried on where the customer is engaged in unskilled labour. No doubt the fact that much stricter evidence is required before a commitment order is obtained than was the case some years ago, has done something to strengthen this conviction in the minds of the traders." Sir John Macdonell, while giving some weight to these two causes, thinks other causes, such as the price of wheat, affect the question. To illustrate this argument he gives a diagram showing the averages of the prices of wheat from 1858, and

the number of plaints since the same. Up to about 1890 the averages correspond fairly well, but after that there is a very considerable divergence. The number of warrants issued, debtors arrested and imprisoned, are much the same as last year. As regards individual Courts, Great Grimsby is far ahead in number of debtors imprisoned. The number is 556 against 528 the year before. Leeds is again second with 299, which is a very large reduction from the 468 of 1911. Out of 46,231 debtors who were arrested, only 5,288 received the full term of imprisonment.

Trial by jury does not seem to have diminished in popularity. In the Introduction there is a summary, from which it appears that, of the actions tried in London and Middlesex, 758 were tried with a jury and 629 without, making those tried with a jury 54·7 per cent. of the whole. This is higher than the percentage for 1906–10, which was 50·1. The percentage of cases tried on circuit is considerably higher, being 69·9; but this is a shade lower than the percentage for 1906–10, which was 71·5. As regards the percentages of cases tried with special and common juries in London and Middlesex, the percentage for specials is 45·6, while the percentage for 1906–10 was 48·8. On circuit the corresponding figures were 51·1 and 48. In the Probate Court the jury percentage was high, being 54·1 and of these 65·0 per cent. were tried by special juries. When we come to the Divorce Court and the County Courts, there is a great change in the proportions. In the former, the cases tried by a jury were only 8·7 per cent. of the whole, the corresponding figure for 1906–10 being 10·4 per cent. In the County Courts the percentage is pretty constant, but the percentage of actions tried with a jury was only 2·21. This is a slight advance on the figure for 1906–10, which was 2·13 per cent.

Some calculations which Sir John Macdonell has worked out to compare the proportions of judges of the Superior

Courts to population in the United Kingdom, France, Germany, Australia, and New Zealand, show that in England there was one judge to 1,130,120 people; in Ireland, one for 313,996; and in Scotland, one for 366,111. There is some dispute as to the exact equivalent of an English judge in the German Judicature. If the *Oberlandesgerichte* may be assumed to be equivalent to the English Supreme Court in Germany (1911), there appears to be one Supreme Court judge to 79,566 inhabitants. If the *Landgerichte* is included, the proportion would be one to 15,797. In France, if we take the Cours d'Appel only, the proportion would be one judge to 82,321 inhabitants; but if we include the Tribunaux Civils de Première Instance, the figures would be one judge to 14,222 inhabitants. These figures are curiously similar to the German. In Australia there was one Supreme Court judge to 139,219; and in New Zealand one to 168,078 persons.

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## V.—SOME PROBLEMS IN LAND VALUES.

TWO years having passed since the Finance (1909–10) Act 1910 came into operation, the time is not inappropriate for reviewing such decisions of the Courts of valuation and of law as, during that period, have assumed to solve the difficulties arising in the administration of that statute.

Incidentally, the problems which still await solution under the Act may be glanced at. Such a review will be found to have a value not only as an appreciation of the present state of the law, but also as furnishing a basis for some intelligent forecast as to the place which the statutory scheme of taxation of Land Values is likely to occupy in the settlement of the land legislation of the future.

It is at any rate clear that the General Land Valuation directed by the statute has finally become a permanent part of the law of the land, and that landowners must approach the consideration of their position without resentment and without bias, dealing with every question as a matter of business administration. In other words, they must collectively and individually direct their efforts to the sound construction and simplification of the system, with the view of obtaining a just measure of consideration.

The group of decisions which naturally first aroused public interest, bore upon the problem of testing the true limits of departmental investigation into the incidents of individual holdings. Those responsible for the Government valuation were seeking to gain material by direct interrogation of landowners concerned. It is a matter of comment that no more speedy and effective way of testing the validity of apparently unwarranted official demands for information was relied on by the owners of land, than the obtaining from the Supreme Court of a decision to the effect that an aggrieved person could bring an action at Common law against the Attorney-General, claiming a declaration as to the invalidity of a particular demand. There are few legal systems throughout the world in which a more speedy and drastic method of impugning what is asserted to be an inquisition of an illegal nature, undertaken by the State, into the affairs of private persons would not be available, and it is a grave question whether, within the constitutional resources of the realm, no more effective remedy could have been or can yet be discovered. For the present, however, *Dyson v. The Attorney-General*, which finally found Form IV to be in very material respects improper, over a year after that demand had been issued broadcast and had been returned wholesale, is the high-water mark of judicial despatch in protecting a private citizen. Form VIII, which presumed to demand detailed information regarding unspecified

land was by the same stately process, in the case of *Burghes v. the Attorney-General*, condemned in the Court of Appeal in the month of November 1911.

It cannot be said that much light has yet been thrown by the Courts upon the proper methods applicable to the finding of values on the general valuation, although a very large proportion of recorded valuations have now become fixed by effluxion of time. Doubtless, the delay in the placing of due limitations upon official inquiry to which we have called attention resulted in a large number of provisional valuations passing through without very close scrutiny on the part of those concerned. There would appear to have been an idea generally prevalent among landlords that if the official machinery of land valuation were found by the Courts to be in any respect defective, this would cause valuations made by the aid of such machinery to become *ipso facto* null. In *Patterson's Case*, however (heard before a Referee on 23rd October 1912), it appears to have been unsuccessfully urged that Form IV having in material respects been held illegal, a provisional valuation based to some extent upon information derived by its aid should be regarded as nugatory. Not only had individual valuations been fixed almost automatically, but a course of official procedure had grown up and become practically riveted upon the land-owning community with the passage of time. At the same time, it must not be too hastily assumed by landowners that a provisional valuation cannot be challenged by landowners after the lapse of the statutory period, but those engaged in advising them must admit that their task is not an easy one when once the sixty days has passed.

The main difficulties in the original valuation arose from (A) the scheme of taxation being, not a levy on a holding in land or an interest in land, or even on land as it stands, but upon the increase between two dates, one appointed and the other from time to time selected, in the value of a theoretical

stratum of each hereditament, that is to say, a site assumed to be cleared; (B) that each valuation had to be made of the unsevered stratum of the hereditament in practice, almost always found implicated with matters excluded from the ambit of taxation, and therefore of a nature rarely capable of being brought to market in its form as assessed to the tax; and (C) that the statute, instead of leaving the fact of the value of the taxable stratum to be arrived at by methods which might commend themselves to the judgment of experts, laid down fixed bases for the calculation of value without giving adequate definitions of some of the factors directed to be brought into the calculation. The decision in the Scottish case of *Herbert's Trustees* (in which an appeal is now pending) to the effect that a *minus* assessable site value could not in law be recorded as an original valuation, seems best to indicate the nature of the problem. The decision proceeded on the assumption that, as the scheme of the statute must be taken to aim at the taxation of something positive, that is to say, an actual increase in value, it must also be assumed that the theoretical stratum to be originally valued must also have some positive value in the market, and if not marketable ought to be set forth as worth at least nothing. As stated, the final solution of the problem has still to be judically declared, but it would appear that a solution would conform most nearly to the policy of the statute which recognised that the value of a composite hereditament may be arrived at by the addition of fractions depreciated, as well as fractions appreciated, by the combination or by extraneous circumstances. In other words, an increase in value may be represented by a decrease in burden as well as by an accretion to an advantage.

The cases which have been decided before the Referees, so far as the records thereof are available, although they have raised, have not definitely settled, many controverted points. In *Whidbornes Case* (decided in July 1912, and from

which an appeal is now pending) some discussion took place regarding deductions allowed under sect. 25 in the case of lands appropriated for roads. In what was known as the *Richmond Case*, the figures to be gathered from a sale which took place subsequent to the date appointed by the statute, but before the provisional valuation, were taken into account in the fixing of the original statutory values. In what was known as the *Woodhall Spa Case*, the price realised by a single transaction of sale taking place before the provisional valuation, was taken as the controlling factor in the calculation of the original, as well as of value on the occasion, although the Commissioners contended, that for the former a lower original valuation should be taken, on the ground that other matters might show that the actual price did not represent what the land "might be expected to realise."

Little, however, has been effected towards the elucidation of one of the main problems concerned with the original valuation, that is to say the first estimate of value to be attributed to buildings. It may not be beside the mark to repeat here an observation which was put into concrete form by those pursuing the present inquiry at the time when the Act first came into force:—

> "Assessable site value is something more than the value of the "cleared land, as the value of a building and the site on which "the building stands is always something more than" (it should possibly be expressed always something different to) "the arith-"metical sum of the two values of the building and the site."

In every composite hereditament there are four elements of value; the value of the bare site, the value of the actual buildings, the enhanced value of the site by reason of the fact that it is so built upon, and the enhanced value of the buildings by reason of the fact that they are attached to the site; nor can it be left out of account that in certain instances enhancement may have to be replaced by "detriment."

Naturally, the main contests which have been the subject of review on appeal from the commissioners, have been upon the assessment of Increment Value Duty on an "occasion." It cannot, however, be too strongly pointed out that success or failure on such an appeal depends to a large extent upon the degree of vigilance which has been shown by the landowner on the making of the Original Valuation, although it is only on the "occasion," when one of the bases of the calculation is taken as finally fixed, that the full result of an unchallenged undervalue of the site on the original valuation becomes apparent. To a large extent the like problems arise on the ascertainment of values at the date of the occasion, as those which have been instanced regarding the original valuation. There are, however, special difficulties which arise from the fact that a value arrived at from what may be termed an "estimated total value," has to be brought into comparison with a value arrived at from what may be termed an "assigned total value," that is to say, in a case where the occasion is a transfer on sale, the price given for the hereditament on the occasion.

Keen controversy has been aroused over the application to occasional valuations of the official instructions given to their valuers by the Inland Revenue Department. These instructions purport to be directions for the ascertainment of site value on occasions. They are not confined to rules of calculation, but proceed to set forth the results which such calculations are designed to achieve as follows:—

First:

> "The transferor will not be called upon to pay Increment "Value Duty in respect of any recovery in the value of the "buildings."

It is difficult to see why the transferor is intended to be freed only from a levy in respect of "any recovery in the value of the buildings," unless it be assumed by the

instructions that though buildings may fall below, and in the process of time reach again, their standard of value on the date of the original valuation, one cannot reasonably conceive it as possible that the buildings might increase to a value in excess of that originally assigned to them.

Secondly:

> "Increment Value Duty would be collectible in all cases "where there has been . . . . (A) an increase in the "value of the site as compared with the original site value."

This is a fair paraphrase of the provisions of the statute, although perhaps it would be more accurate to say "where pursuing the method of calculation directed by the statute there becomes apparent an increase in the site value."

Thirdly:

> "Increment Value Duty would be collectible in all cases "where . . . . the unit of valuation (or an interest "therein) has actually been sold for more than it is worth at "the time."

This third result, held forth as one to be achieved, gives rise to considerable difficulty, because the phrase employed would seem to include even the case of an actual decrease in total value, and in any event it disregards the vital consideration of what is the factor in the value in which the increase has taken place.

A remarkable illustration of the difficulty appears from the admitted facts in the much-discussed *Lumsden Case*. There the contention of the landowner supported a calculation which appropriated the whole of the enhancement in value indicated by the price paid on the occasion of assessment, to buildings, whilst the contention of the commissioners supported a calculation which appropriated the whole of the enhancement in value so indicated to the site. The difficulty which underlay the case may be appreciated from the fact that, although the land and buildings were sold as a

complete hereditament in 1910 for £750, yet both parties seem to have assented to the gross value (a value at least equal to market value in the purview of the statute) of the whole hereditament being properly placed on the 30th April 1909 and in February 1911 (that is to say, at two dates respectively a year before and a year after the sale), at £658. This, if it approximated to actual fact would represent a very interesting, if very puzzling, curve of values within a short period of time.

The difficulties which arose in the case must be considered to still remain unsolved. They have not been removed by the official instructions which appear to place side by side the "willing seller," contemplated by the original valuation, with the "zealous buyer" giving for the hereditament on the occasion "more than it is worth at the time," instead of what the hereditament "might be expected to realise." The phrase, "more than it is worth at the time," is one of doubtful accuracy. In fact, the hereditament is worth at the time what a willing seller is able to get for it, and it matters not whether the price on the occasion be enhanced or diminished by accident or sentiment. Even, however, if this question (which may be placed under the head of automatic liability to Increment Value Duty) of every hereditament fetching a price beyond its market value were settled, the further question would still be left open as to the distribution of fancy value as between site and buildings. It is possible that the *Palmers Green Case* (which is now under appeal) may throw light upon the matter.

The questions which have been briefly discussed in the foregoing seem to a large extent to be raised in a carefully drawn special case stated by one of the learned Referees for Scotland, but the only available reference being to an anonymous title it cannot be identified in the list of cases standing to be heard on appeal. There, however, the facts are complicated by a somewhat difficult series of contentions

regarding the motives, to some extent sentimental and extraneous, of the purchaser in giving the price paid on the occasion.

Nothing appears to have been done to place on any authoritative footing the sound construction of the provisions of the statute relating to the liability or exemption of agricultural land to Increment Value Duty, and the doubts suggested as to the appropriateness of the language adopted on this head at the time of the passing of the Act still remain unremoved.

One of the most satisfactory decisions is that given by the Referee, to whom fell the determination of the true construction of the provisions relating to substituted site value on the points raised in Roche's appeal. Certain freehold property in the City of London had been the subject of a final valuation. The appellants were respectively the mortgagee and the owners of the equity of redemption. The material mortgage charges were (A) for £12,500 under a legal mortgage in 1891; (B) for £4,000 in 1897; (C) for £1,000 in 1899; all the advances being made between the same parties within the statutory period and subsequently assigned to the appellant mortgagee. The gross value was found by the original valuation to be £12,000, and this was substantially the figure (with its attendant calculations for other values) fixed on the application for a substituted site value. The question in effect was whether, on the one hand, the first mortgage was alone to be regarded, and whether it was to be treated as if a transfer on sale; or on the other hand, all the mortgages were to be taken cumulatively into account and the aggregate of the advances treated as substituted value. The Referee, with perfect propriety as it seems, decided that the aggregate of the sums advanced on the mortgages ought to be taken as the amount for which the land was mortgaged. It would, however, seem that apart from problems which

remain unsettled under the principal Act, there are many questions which await decision by reason of the bearing of the amending provisions of the Revenue Act 1911.

The Reversion Duty sections have furnished matter for several interesting and far-reaching discussions. As might be expected, the controverted points have been chiefly based upon claims for exemption from the duty either in whole or in part. The principal Act clearly exempted from Reversion Duty any benefit accruing to the reversioner:—

(A) On the determination of a lease of land which at the time of the determination was actually used for agricultural purposes.

(B) Where the original term of the lease did not exceed 21 years, or where the reversioner himself at the time of the determination of the lease had tenure not exceeding 21 years.

(C) Where the reversion was purchased (and this by the decision in *Commissioners of Inland Revenue* v. *Gribble* has been found to mean acquired in a commercial sense and not merely by conveyance on trust) prior to the Act, to a lease having less than 40 years unexpired at the date of the purchase.

(D) Where lands revert to the Crown, or where there is a determination of a lease held by a charitable body for charitable purposes, by a statutory body for statutory purposes, or by a rating authority.

A virtual exemption has been established, by the decision in the *Commissioners of Inland Revenue* v. *The Marquess of Anglesey*, in favour of a landowner acquiring the surrender of an existing lease, in consideration of the grant of a fresh lease upon such conditions of term and rent as make it evident that no substantial benefit accrues to the landowner by the conjoint operation of the surrender and re-grant. This result is brought about by construing any

compensation payable at the determination—including that payable by voluntary agreement—as included in the consideration for a surrender of the unexpired term.

The *Stepney and Bow Foundation Case* (decided in favour of the commissioners on the 15th March 1912, but in which an appeal is now pending) seems, in so far as it has been reported, to be based upon a distinction of doubtful authority made between a covenant in a lease and a covenant in an agreement for a lease. The further difficulty disclosed by the facts of the case as to the nominal character of the consideration would appear to have been ignored.

Very few recorded cases deal with the incidence of the Undeveloped Land Duty. The case of most importance seems to be that of the Duke of Devonshire. A courtyard and land adjacent to an urban mansion-house and used for the amenities of residence were found by a Referee to be exempt. There seems, however, little warrant in the statute, having regard to the reported facts of the case, for such a distribution of the exempted area.

The case of the Leeds Fireclay Company again leaves open the problems connected with those mining operations which of necessity interfere with the surface of land, and with the extent of their entitling the surface owner to exemption from Undeveloped Land Duty, as being a business, trade, or industry within the meaning of section 16 of the statute.

The amending provisions of the Revenue Act of 1911, giving power to obtain the aggregate valuation of contiguous pieces of land in the same ownership, will diminish the difficulty which was felt in the case of one parcel being in course of utilization, another being held for the purpose of ultimate extension of operations.

Another question which hitherto has been left without the aid of judicial construction, is how far a business actually devoted to the furtherance of the policy of the Act, that is to

say, the bringing to the market of land fit for development, comes within the exemption provisions of the statute.

Mineral Rights Duty has claimed the attention of the Courts on a few occasions. The results may be summed up as follows:—In the *Trustees of Sir Robert Peel's Settled Estates*, it was decided that surface rents were not liable to be assessed to Mineral Rights Duty. The *Duke of Beaufort's Case* decided that rent paid by the working lessee in last working year includes arrears paid in that year. *Anstruther's Trustees* placed felsite, whinstone, and granite outside the range of excepted minerals. The real questions which underlie this portion of the statute have not, so far as reported cases show, been dealt with in any tangible form, and in particular the very difficult questions connected with increment value assessment upon minerals not returned, or returned as of no value, by the owner at the time of the original valuation.

It has only been possible to glance at some of the large number of problems which await solution, or which have only been partially solved by the decisions hitherto given, without attempting to do more than indicate solutions which might be of general applicability. Each particular case can only be safely judged by reference to the distinctive features which are special to it.

It is in conclusion submitted, whilst accepting the fact of universal valuation of land throughout the country, and applying with loyalty the scheme of land taxation based upon the principal Act, that the following legislative amendments are needed:—(a) a method less precarious than that already provided for the adjustment of obvious errors in the original valuation, provided that the circumstances are such that the strict application of the recorded valuation might work substantial injustice; (b) a simplification of the statutory calculation, whether for original or for occasional valuations; (c) an exhaustive definition clause sufficient to

remove many uncertainties from what should be a model of legislative clarity—a taxing statute. Enough has, however, been said to show that amendments of the Act might with advantage be undertaken by the Legislature on some important points, apart from those questions which await the assistance of judicial construction.

EDWD. S. COX-SINCLAIR.

T. HYNES.

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## VI.—CURRENT NOTES ON INTERNATIONAL LAW.

### The Declaration of London.

IT is announced that the Government intend once more to introduce into the House of Commons the Naval Prize Bill, without which the Declaration of London cannot well be ratified. The Bill was only passed in November, 1911, by a majority of 47—less than half the normal majority of the Government—in the Commons; and was rejected by the Lords. It appears to be possible to pass it under the provisions of the Parliament Act; and the Government having demonstrated the ease with which a number of complicated and controversial measures can simultaneously be pushed through the Lower House, the intention to put through legislation of this kind in the coming session may well be entertained by them. It is at any rate obvious that a fitful but wide-spread campaign is being initiated in favour of the Declaration, particularly among mercantile men. The object appears to be to play upon their fears, to represent International law as non-existent, and to impress upon them that the Declaration is the only means of securing a modicum of safety. Prize law is a very specialised subject. The memory of the last maritime

war has died out. Mercantile circles are an easy prey to an alarmist campaign. The supporters of the Declaration can point to a very few isolated misdeeds, and representing the rare exception as the rule, they can cause grave misgiving in the minds of merchants.

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If France fulminated an absurd decree against rice in China in 1885, she never carried it out. If Russia sank a ship or two in 1905, she apologised and discontinued the practice. These small matters cannot weigh in the scale against the constant practice of great maritime wars, and the established attitude of the world hostile to any extension of belligerent power over neutral commerce. To appreciate the wildness and the intrinsic insignificance of the Russian aggressions, one must have become steeped in the atmosphere of Prize law. A child may be terrified by a *feu de joie*. But a man of the world knows that it is only blank cartridge. It is the business of the independent jurist to assure the merchant that the terrors which are conjured up for him are imaginary. It is our duty to tell him that there is a law of Prize, well established and recognised, and that it only needs to be insisted on, to prevail over autocratic interference.

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If the law of Nations is to be played fast and loose with—if a momentary Russian pretension is to deprive it of validity—what possible security have we? The Declaration will similarly be repudiated, as inconsistent with modern developments and with the paramount interests of Russia, whenever it is found convenient to do so. Indeed, that would scarcely be necessary, for it and its gloss by Renault simply bristle with ambiguities, of which a belligerent would be stupid indeed not to take advantage. Nevertheless an active campaign is being waged to convince commercial circles of the benefit which will accrue from its

adoption in place of the tried laws of two centuries of naval history. Professor Politis has been lecturing to the French Association de Droit Maritime on the beauties of the Declaration. The Greek professor was called in to report on the value or otherwise of the instrument. It was a curious choice of an independent referee, as he had already expressed at length his approval of it! The Association would have got a very different reply from Mr. Kleen. M. Politis treats the question of what is contraband as depending on the arbitrary will of the combatants! He ignores the fact that in the (very rare) cases in which innocent articles were captured as contraband, they were *bought and paid for.* If history is played with in this manner, it is easy to make out a good case for anything.

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The real root of the Russian mistakes, and of the uncertainty of the present position, is to be found in the habit of writers to disregard practice and to theorise in the air. Nothing was further from the mind of that great writer, Calvo, than to encourage belligerent interference with neutral trade. But, giving a blindly literal application to *obiter dicta* in an American case—the *Commercen*—he was led into laying down a principle which is in appearance fair, but in practice disastrous. That is, that it is the intention of the exporter, and not the quality of the goods, which determines the innocence of a given cargo. A phrase of Judge Story's caused all the mischief; and nobody would have been more surprised than Joseph Story, the friend and correspondent of Lord Stowell:—

"If destined for the ordinary use of life in the enemy's country, goods are not in general contraband, but it is otherwise if they are destined for military use. Hence, if immediately destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband."

Did Story mean by "destined," *intended* or *avowedly set en route?* Had he meant the former, he would have been flying in the face of all the active and established usage of the prize-courts which were then in active working. We know, on the contrary, he was anxiously seeking expert guidance from Lord Stowell. Story certainly did not mean to set up any new doctrine that the "intention" of the shipper was enough to condemn him. He uses the word *destined* (as is clear from his mention of "destination" for certain ports) as equivalent to *consigned* or despatched. Had he meant to convey that the supposed mental intention of the exporter was always sufficient to stamp the goods with the quality of contraband, there would have been no point in the mention of the naval and military ports at all. It would have been enough to say that the fatal circumstance was that the articles should be meant for army or navy use. The phrase "destined for" has a local, not an intellectual, connotation. A threshing machine is "destined for" Australia, in this sense, when the bill of lading is signed for Australia; not when the shipper has made up his mind as to where he will send it. And in the particular case of the *Commercen*, the cargo was admittedly going straight to—had, that is, as its immediate local destination—the enemy's army actually at Bilboa. It so appeared on the face of the ship's papers; she was specially licensed to carry it, and was virtually a British victualling ship. The case cannot support a general assertion that an intention that goods shall be put to military use is enough to make contraband of them.

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It is announced that a small committee has been formed to watch the progress of events and to keep the true facts before the public. Such high authorities as Professor Holland, K.C.; Mr. J. G. Butcher, K.C., M.P.; Dr. Schuster and Mr. Douglas Owen, have joined this body, of which Mr. L. A. Atherley Jones, K.C., M.P., is Chairman.

## Mexico.

Very remarkable was the clamour with which in most English journals the United States were pressingly invited to take over Mexico. The experience which foreigners have had of trying to manage Mexico, is by no means an encouraging one. It has been found in the long run the most conducive means to the protection of foreign interests in the country, to let the Mexicans manage themselves—however much powder may be wasted in the process. In the middle of the 19th century Britain, France, and Spain attempted, under Palmerston's guidance, a tripartite intervention, the pivot of which was the subvention of revolution. When the revolters found that they were to be saddled with payment of compensation for the misdeeds of those whom they had displaced, they turned against their foreign backers, and the European forces were glad to withdraw. The Franco-Mexican Empire, which was established subsequently, met a sudden and inglorious end. Since then Mexico, untroubled by foreign menaces, has developed enormously. Civil disturbances, like measles, are natural incidents at certain stages of existence. It is best to let them work themselves out, and to refrain from the natural desire to substitute prosperous order for devastating conflict. That would be to sow the seed before the plough has done its work.

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The United States Government, better advised than its English advisers, is holding severely aloof; Mexico appears to be calming down, and a new era of prosperity, based on a more durable ground than the personal qualities of a Diaz, may be hoped to be in prospect Much difficulty will be created if foreigners insist on being compensated for losses caused in the conflict. It cannot be too often repeated that foreigners can be in no better position than the people of the

country. Foreigners take, as Bismarck justly said, the risks of the country where they go. It has of late, with increasing frequency, been the practice for American states to compensate them for losses caused in civil commotions. It is an abuse: and can only lead to this result—that a nation must be hampered by the presence of foreigners in clearing itself of tyranny. It is to deny the sacred right of revolution, and the still more sacred right of preserving order. Those who are curious to see how neutral subjects may fare in civil war, may glance at the case of Mr. Finkenstein, who was bayoneted and robbed by troops engaged in the suppression of the insurrection in Poland of 1863. (*Brit. State Papers*, Vol. 38, p. 842.) Belgium paid no compensation for neutral losses sustained in the bombardment of Antwerp; Britain none for the bombardment of Alexandria; Chili none for the bombardment of Iquique. War cannot be governed by commercial considerations, and we shall be much surprised if in the result, Mexico pays anything more than she feels inclined.

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## Stathatos *v.* Stathatos.

The dictum of the late Lord Gorell and his brethren in *Ogden* v. *Ogden* ([1908], P. 82), regarding the jurisdiction of the Court to entertain the dissolution petition of a wife whose husband's domicile disclaims all knowledge of him as a married individual, has now been confirmed by authority. For all that, it is by no means certain that it is consistent with principle, or with ultimate convenience. It will be remarked that there is no question here of the assumption of jurisdiction by the English Courts on the ground that the wife has been deserted in England, thereby acquiring a constructive domicile abroad in the country of her absconding husband's choice. The determination of that question must be determined on entirely different

reasoning. We are here concerned with an alleged marriage which the law of the presumptive husband's domicile refuses to recognize.

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The only logical attitude, in such a situation, is to do as Jeune P. did, and, while regretting the divergence of rules of Private International law, to maintain the position that the foreign tribunal, though unwilling, is the only competent one. To hold otherwise would be to introduce for the sake of a slight advantage, an intolerable ambiguity into marriage relations. The principle once broken down, that the law of the domicile and the Courts of the domicile are the only tribunals, and the only law, to which the maintenance and dissolution of the marriage tie are to be referred, the parties are thrown into a sea of confusion. Is the English Court, when it benevolently intervenes in a domiciled foreigner's affairs, going to apply English matrimonial law to them? If it is, it will find itself faced with some very pretty dilemmas, since it can hardly treat him as a domiciled Englishman for all such purposes (*e.g.*, the decision of questions of legitimacy). If it is not, it is undertaking a duty about which it knows nothing.

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That, perhaps, is not a decisive consideration. Yet surely the adoption of the principle that the Courts of the domicile must be regarded as the sole authority in matrimonial affairs was due to the feeling that, in an administrative jurisdiction like that of a matrimonial Court, the law can only be satisfactorily applied by the tribunal which is constantly engaged in administering it. It might be a mistake to select the Court of the domicile as the proper one. As is well-known, it was only in *Le Mesurier* v. *Le Mesurier* ([1895], A. C. 517) that such a principle was established. In *Niboyet* v. *Niboyet* (4 P. D. 1) the doctrine was preferred that the Court (and, therefore, the law) of the place of

residence was authoritative in matters of dissolution as well as of divorce *a mensâ*. This imitated the ecclesiastical practice which prevailed in the days when the matrimonial law was uniform throughout the Christian world. The law being uniform, the choice of a judge was a secondary matter. It does not, therefore, seem to have been the subject of any precise determination whether the residence need be that of both parties or of the defendant; or whether the *forum actoris* was ever competent. In modern times, when the law prevalent in the diocese of York diverges so enormously from the law of the diocese of Naples, there can be no laxity in this respect without serious danger. Relief to an injured petitioner cannot be accorded on grounds of expediency without introducing an element of anarchy into an already confused relationship. It is admitted that the position of a married couple whose proper law, ascertained by English principles, regards them as unmarried, is an awkward one. But hard cases make bad law. Simplicity and certainty are more valuable than indulgence. It may be noted that the petitioner in the case (*Stathatos* v. *Stathatos*, 82 L. J. P. 34) was originally a domiciled French subject; also that Mr. Justice Deane observed that he would feel much more satisfied if he could feel that the case would be taken to appeal; though he also observed that it would be a disgrace if his decision was not upheld. It may also be remarked that the petitioner did not allege bigamy, but relied on desertion, which was less satisfactorily proved by the evidence.

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## Consent in Marriage.

Another singular matrimonial cause is worth a passing notice, though it involves no international point. A Roman Catholic, Count Boni-Castellani, married a Protestant in the United States. Some express understanding appears to have existed that civil proceedings for a dissolution might

be contemplated as possible in certain eventualities. This has been held by the Papal Consistory—though it is understood, not finally—to justify a decree of nullity, on the ground that no due matrimonial consent was present. Since the step from express to tacit understandings is a short one, this decision appears to open up an exceedingly wide door. As a matter of fact, the wife did obtain a dissolution of the supposed marriage in France, but this was, of course, not recognised by the Roman Church. Nullity decrees have always been afforded a convenient back-door from the matrimonial habitation. In the time of the Reformation they were accorded on such frequent pretexts as that of pre-contract; and, obviously, they acted as a safety-valve in times when dissolution was unknown. In fact, in our own time, there have been known nullity cases the parties to which have subsequently had issue in other alliances. And has not President Evans granted such decrees where both parties severally protested their own willingness to cohabit? The historic repudiations of Queen Anne of Cleves, and of the Empress Josephine, were based on this same transparent device of alleging want of due matrimonial consent; though in Josephine's case there was the further fact of the absence of the parish priest, the informal ceremony having been hurriedly performed by Cardinal Fesch.

There is of course this to be said for the Papal decree. If the parties to an asserted marriage evidently have the intention in certain contingencies of ceasing to carry out their mutual obligations, it seems inconsistent with the character of the institution, which is professedly permanent. But is it actually so? The causes of divorce *a vinculo* are not less strong than the causes of divorce *a mensâ*. The parties to a Catholic marriage are permitted to contemplate separation in the latter case, *ergo*, there is no harm in contemplating it in the former. The further contemplation

of a possible re-marriage is merely the contemplation of a future ecclesiastical offence. Consequently, the tendency of most jurists will probably be to prefer the judgment of the Court of first instance, which refused the decree. The reservation must be made that if the contemplated causes of separation were not canonical causes (*e.g.*, "incompatibility"), the above argument would naturally not apply.

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## The Panama Canal.

An eloquent and influentially signed circular has been issued on this subject in America. Messrs. Choate, Root, White and their colleagues, are entitled to the utmost credit for the courage and straightforwardness with which they impress on the American public the desirability of the United States standing loyally by their engagements. But it is perhaps not ungenerous to remark that they are scarcely justified in all their historical statements. The summary of the Clayton-Bulwer treaty of 1850, with which the document opens, is superficial to a degree. For it is not the fact that the principal concern of that treaty was with "an Isthmian canal." Its principal concern was with a Nicaraguan canal. In respect of the construction of such a canal, Britain was entitled to be heard; for she had a *quid pro quo* to give. The only possible western exit of the canal—the mouth of the River St. Juan—was colourably alleged to be in the hands of her allies the Mosquito Indians. With the construction of a Panama canal she had nothing to do. Only a pious, and entirely vague, aspiration was thrown into the concluding clause of the treaty, expressing a desire that any canal to be constructed in the future between the two seas might be subject to a similar *régime* of joint equality.

Nor is it true to say that the diplomacy of the United States from 1850 to 1912 always understood it so. Mr. J. G.

Blaine, writing in the course of his discussion with Lord Granville in 1881, observed to the U.S. ambassador in London (29th Nov. 1881):—

> "Art. VIII does not stretch the guarantees and restrictions of Art. I, over either the Tehuantepec route through Mexican territory, or the Panama route through Colombian territory. It is in terms, an agreement to extend the protection of both countries by treaty stipulations, to those or any other practicable waterways or railways from ocean to ocean across the isthmus, outside of Central America."

And this he styles "a vague and unperfected compact," which it undoubtedly was.[1] Moreover, there was no attempt to apply the provisions of the Clayton-Bulwer Treaty to the Panama Railway. And Mr. Frelinghuysen (8th May, 1882) shows clearly that Art. VIII is altogether executory and indefinite.

So far as definite obligations were concerned, the treaty only concerned the construction of a canal in Nicaragua, and the mutual renunciation of control in "Central America." "Central America" had a perfectly definite meaning; it meant the territory which had quite recently been officially known as "the Republic of Central America," *i.e.*, Guatemala, Honduras, San Salvador, Costa Rica, and Nicaragua, excluding Panama, with the isthmus, and the rest of Colombia.[2] The whole of the treaty, including the preamble, concerns nothing but this Central America, and a

[1] Mr. Blaine does not shine as a prophet in the despatch of 24th June 1881. He refers to Britain's maintaining "a vast naval establishment which . . . we do not need, and in time of peace shall never create." It has been created. He says: "In only a single instance during the past 100 years have the United States exchanged a hostile shot with any European power. It is in the highest degree improbable that for a hundred years to come even that experience will be repeated." What was in the highest degree improbable to happen in a hundred years happened in seventeen. He remarks "Between the United States and the other American republics there can be no hostility, no jealousy, no rivalry, no distrust." Wonderful!

[2] See Sir H. Bulwer's despatch of 6th Aug. 1850. (*State Papers*, vol. 40, p. 1043), where this express definition is given.

Nicaraguan canal. The only exception is that in Art. VIII the treaty powers agreed "to extend their protection" to any isthmian canal or railway, especially if made viâ Panama, subject always to the owners making fair charges and allowing it to be used on equal terms. The language is very confused, but there is certainly no clear undertaking by either power to secure equality.

It may also be gravely doubted whether the Clayton-Bulwer Treaty of 1850 was made "at the request and on the initiative of the United States." After Lord Palmerston had authorised its signature, the British Minister in Washington was still writing home that, "Mr. Clayton entertains a strong hope that the President" would shortly authorise its signature on behalf of the Republic.[1] This does not look like American pressure.

When the Hay-Pauncefote treaty was in 1901 substituted for the Clayton-Bulwer treaty, it did not enlarge its scope. Its provisions were implicitly limited, as those of the other had been, to the Central American canal which Britain, through the Mosquitos, might have blocked, and did block. The treatment of canals south of "Central America" was left in 1901, as in 1850—as was proper—to be the subject of future bargaining, with a leaning to the side of equality. It would seem, therefore, that the United States are under no definite treaty obligations as far as the Panama Canal is concerned. They could have constructed it in 1899 without in the least impairing their vague undertaking of 1850. The vague Art. VIII of 1850 was really directed against private monopolists: neither Britain nor the States would be bound to protect them if they made unfair charges. The States, that is, agreed to protect a fair canal: they by no means precluded themselves from constructing a monopolist one. It was, in fact, in view of a projected Nicaraguan Canal that they obtained the Treaty of 1901. That the

[1] Bulwer to Palmerston, 31st March 1850 (*State Papers, ubi sup.*, p. 1021).

Article is referred to in the preamble of the Treaty of 1901 is no argument against this contention.

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The official reply of their Government to Sir E. Grey's expostulations does not take this ground. Ignoring Mr. Blaine and all his works, it merely observed that until the tolls are actually fixed, it is too early to complain that they may prove to be unfair. The Secretary of State takes precisely the position indicated in these pages last November as the correct one. If the charges on shipping generally are no higher than is proportionate to the cost of construction and maintenance of the works, their remission in certain cases is nothing but a subsidy, which comes out of the United States' own pocket, and to which no one can in reason object. This, nevertheless, cannot justify the total exemption of "coasting" trade.

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## The Adriatic Naval Demonstration.

The rather futile efforts which are being made to induce Montenegro to release her grip of Scutari—which should, of course, be Albanian—by excluding arms and troops from her ports, are entirely without justification, except as measures of war. If we are at war with Montenegro, well and good; we know where we stand. If not, the following propositions are axiomatic: (1) We cannot interfere with the ships of foreign nations destined for Montenegro. (2) The commander of a British ship which should interfere with our own vessels so destined, would be liable to damages, or might be restrained by injunction. For a further discussion of such measures as this, the reader is referred to *L. M. & R.*, Vol. XXIII, p. 106, dealing with the case of Crete. It may be added that the stoppage of arms and troops alone can in no case be effected by a blockade, which must (*The Franciska*, 4 W. R. 100) be universally applied, if it is to stand good.

It is of the essence of a blockade that neutrals should readily be able to judge from observed facts whether it still subsists or not. This they cannot do, if some craft are constantly passing in and out of the so-called "blockaded" port. The stoppage of arms and troops for a particular littoral may or may not be justified, according to circumstances. One is, of course, justified (in International, if not in Municipal law) in stopping one's own ships. There is no possible justification in stopping the ships of third powers, or of the littoral affected. War is the only sanction of such violence.

These remarks apply on the supposition that the so-called "blockade" consists merely in turning back troops and munitions of war. If, as later advices suggest, there is a general exclusion of commerce as well, we have an ordinary case of so-called "pacific" blockade. This, it is generally admitted, cannot affect the ships of third parties, and it is probably tantamount to war against Montenegro. (Cf. *L. M. & R.*, Vol. XXI, p. 285.) How far such a measure would affect British vessels has never been decided. Presumably, since the Crown would disclaim the existence of a state of war, no interference with them could be legally justified.

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## A Great Jurist.

As we go to press, word comes of the decease of Mr. John Westlake, K.C. Professor Westlake—for he will always be "Professor" in the minds of his old Cambridge pupils—was not only a distinguished lawyer: he had a spirit open to the appeal of every humane and liberal cause. His vast stores of learning were available to the inquiries of the veriest tyros in juridical science. His saturation in the legal atmosphere of Continental thinkers was (especially in a practising barrister), amazing. His sanity and balance were no less remarkable than were his enthusiasms. He protested equally against the Russian coercion of Finland and

the Italian coercion of Turkey. As an original founder of the Institute of International Law, he was the *doyen* of International lawyers. It is nearly sixty years since, as a young wrangler, he wrote *A Treatise on Private International Law*. For condensed hard thinking, scientific consistency, and cogent sense, the treatise has never been surpassed; probably, never equalled. In the domain of Public International Law, he was less successful. His extremely subtle intellect, was less suited to grappling with broad questions of statecraft. But in that most difficult and delicate tissue of problems which is presented by the Conflict of Laws, he was unapproachable.

TH. B.

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## VII.—NOTES ON RECENT CASES (ENGLISH).

THERE is no doubt about the importance of the judgment in *Reversion Fund and Insurance Company* v. *Maison Cosway, Limited* (L. R. [1913], 1 K. B. 364), of Buckley, L.J. and Kennedy, L.J., from which Vaughan Williams, L.J., supporting the decision of Scrutton, J., in the Court below, differed. It has a threefold effect. First, that it is not *ultra vires* for a corporation, even though it has no borrowing powers, to obtain a loan from a person who is aware of their incapacity, provided that the money obtained on the loan is employed in paying off existing debts of the corporation; in such case, the transaction adds nothing to the total of the corporation's liabilities. Second, it is not material that the loan is obtained by the negotiation of an agent of the corporation who had no authority to act for them to that end. Third, it makes no difference that the lender had knowledge that the agent was without authority to pledge the credit of the corporation. In all these cases the lender, though he cannot claim by subrogation, is entitled to repayment by the corporation of all the money

advanced by him that has been expended in discharging the corporation's indebtedness. With respect to the two adverse judgments of Vaughan Williams, L.J. and Scrutton, J., their inspiration seems to have been a sentence in Romer, L.J.'s judgment, in *Bannatyne* v. *McIvor* (L. R. [1906], 1 K. B. 103), that where money is borrowed on behalf of a principal, "the lender believing that the agent has authority though it turns out that he has not," the lender is in equity, so far as his money has been applied in paying legal debts of the principal, entitled to stand in the same position as if he had lent to the principal direct. This might be read as if the Lord Justice had excluded the case where the lender was not under the belief that an authority to seek a loan reposed in the agent. Perhaps, however, he restrained his statement to what was necessary to support his judgment. But in any case the lender's knowledge of the principal's lack of capacity to borrow, or of the agent's lack of authority to obtain a loan would, it seems, pass out of discussion, as soon as the rule is established that the lender is entitled to recover money of his applied in discharging obligations of the borrower.

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The Dentists Act 1878 does not, it has been held, preclude an unqualified person from fitting artificial teeth, nor even from extracting natural ones; which is a near approximation to dental surgery; but it does preclude him from using any description implying that he is a dental surgeon. This gives a certain interest to *Robertson* v. *Hawkins* (L. R. [1913], 1 K. B. 57). If an employee of a public body is directed to obtain a certificate that his defective teeth have been put in order by a registered dentist and no other, it is clear that he must comply. If then he goes unwittingly to an unqualified person, and to him exhibits the official order in which the qualification requirement is prominently set out, does this, or with what collateral circumstance with it, bring within

the Act the unqualified person who operates? As a matter of fact in the case, there was no more done than the extraction of some teeth, and no certificate was given. But the Court held that, by the statement of an unqualified person that he had given to the postal authorities hundreds of such certificates as were required in this case, he had implied that he was registered under the Act. If the facts accord with the statement, it is a ground for some surprise that the postal authorities accepted such certificates, when simple reference to a directory would have afforded the knowledge that they were given by a person unqualified.

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The "necessaries," liability for which raise an infant to partial equality with his elder who is *sui juris*, have, owing to social expansions, been frequently extended in number by judicial decisions. *Roberts v. Gray* (L. R. [1913], 1 K. B. 520) somewhat enlarges the liability itself, for it decides that a contract entered into between the experienced billiard player, the plaintiff, and the defendant, an infant player of unusual promise, was a contract for necessaries, as an important part of it was instruction which the younger player would receive. And as there was nothing burdensome in its terms to prevent its being enforceable against the infant it was binding upon him; and not the less so that part of it was executory owing to his having repudiated the contract after it had been in operation for a certain time, up to which he had had the benefit of instruction.

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No recent case has secured more attention than *Lumsden v. Commissioners of Inland Revenue* (L. R. [1913], 1 K. B. 346). But as it has been exhaustively discussed by the press, vigorously condemned by professional societies concerned with the interests it invades, and has been the subject of remonstrance in Parliament itself, and as legislation upon it will probably ensue, it is superfluous to note the case

in this number. It may, however be said, with regard to sects. 2 and 25 of the Finance Act, 1910, that it would almost seem that ingenuity has been expended in making obscure rather than clear the process by which site value is to be arrived at.

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It is well that *Taff Vale Railway Company v. Jenkins* (L. R. [1913], A. C. 1) has, after the remarkable conclusions come to by the three lord justices when the case was before the Court of Appeal, gone up to the House of Lords. And it is satisfactory also that a number of conflicting decisions are now subordinated to a decisive ruling, that a claim under the Fatal Accidents Act 1846 can be supported if it can be shown that a plaintiff, coming within the terms of the Act, had a reasonable expectation of pecuniary advantage from the earnings of the person killed, even though no past contribution had been made by the deceased.

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The strict construction of a sentence in the judgment of Kennedy, L.J., in *Biddell Bros.* v. *Clemens Horst & Co.* (L. R. [1911], 1 K. B. 956), was boldly departed from by Scrutton, J., in *Landauer & Co.* v. *Craven & Speeding Bros.* (noted on another point in our issue for August 1912, Vol. XXXVII, No. 365), and has now, in *Orient Co. Limited* v. *Brekke & Howlid* (L. R. [1913], 1 K. B. 531), been enlarged by an interpretation of the Divisional Court. Kennedy, L.J's., *dictum* was, that delivery of goods afloat under a c. i. f. contract could be made by tender of the bill of lading accompanied "in case of loss" by the insurance policy. This seems to imply that if the goods arrive safely at the port of destination the policy of insurance need not be tendered. But amongst the objections to this implication is the important one that a buyer, wishing to transfer his bargain before the arrival of the cargo-bearing ship, would have some difficulty in the absence of the policy.

Another objection would be, that if the goods arrived damaged the buyer would lose the ready remedy which the policy would afford him. And the interpretation which the Divisional Court has put upon the *dictum* is, that it referred not to an ascertained past fact, but to a present risk. But whatever it meant, it could have no application where in a c. i. f. contract no insurance had been effected at all, otherwise the consignee would be required to pay a fictitious charge which had never been incurred, and would be deprived of a protection for which he had stipulated.

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The decision in *Rex* v. *Davies* (L. R. [1913], 1 K. B. 573) is of interest, so far as it removes any impression that may have existed, that the consent of the Attorney-General is necessary to the prosecution of an agent (in this case, the paid treasurer of a friendly society) for misappropriation of money. Sect. 75 of the Larceny Act of 1861 renders liable to punishment a person who fraudulently converts to his own use funds entrusted to him as an agent. The persons aimed at, are those having for reward the charge of money in the way of business, such as bankers, brokers, or attorneys; and nothing in the section is to apply to trustees. But trustees are separately brought within the Act by sect. 80; and it is with respect to these persons that the section provides, that no proceeding for any offence included in it shall be commenced without the consent of the Attorney-General. The two sections are quite distinct, and no person could fall within both. Then came the Larceny Act of 1901, which, by its first section, re-enacts the force of sect. 75, but leaves sect. 80 untouched. It is impossible, therefore, in the opinion of the Court, that the repeal of sect. 75 and its re-enactment in language only slightly differing, could enlarge the meaning of sect. 80, and make its words "any offence included in this section" include also an offence which they could not have included before the Act

of 1901. Under this Act, therefore, the sanction of the Attorney-General is not required.

T. J. B

In commenting on the decision of the Court of Appeal in *Solomon* v. *Attenborough* (L. R. [1912], 1 Ch. 451), we respectfully said (Vol. XXXVII, at p. 340) that we could find no shadow of authority in support of the view of the majority of the Court, that an executor could not give a good title to his testator's goods unless in alienating them he purported to act as executor. We added at the same time that the ground on which Fletcher Moulton, L.J., based his judgment, namely, that the executors (who were also trustees of the will) "had, in effect, delivered the testator's chattels to themselves in the character of trustees," seemed absolutely good. The House of Lords have now delivered judgment, *Attenborough* v. *Solomon* (L. R. [1913], A. C. 76), and have supported the decision of the Court of Appeal upon this ground, and upon this ground alone.

Lord Haldane, L.C., stated the law shortly to the following effect. Where the same persons are appointed both executors and trustees of a testator's chattels, then on their having fulfilled all their duties as executors so far as they are aware, their title to the chattels to be held in trust, changes its character. It ceases to be the title of co-executors, and becomes that of co-trustees. It is true they do not cease to be executors, and as executors, if the necessity arises, they can always sell the chattels in order fully to administer the estate. But still when the time comes when, if they were not trustees, they would in ordinary course assent to the legacy, being trustees of the legacy they must be taken as having assented to it, and so they become joint tenants, and as such one of them cannot without the other's consent make a good title to the property involved.

This seems to us quite good law and good sense. It would have been better, however, if the House had expressed clearly its opinion on the doctrine propounded by the Court of Appeal. It may be perhaps taken as being implicitly over-ruled, since the appellant's counsel cited cases to show that the title taken by a purchaser from an executor in no way depended on the fact that he knew or did not know that the executor was acting as executor; and Lord Haldane stated in his judgment that he agreed with counsel's contentions. It would have been better, however, if this were not left a matter of inference. After all, the consciousness that it cannot be over-ruled should give the House confidence in its own opinions, and the courage of them too.

In *Pullan* v. *Koe* (L. R. [1913], 1 Ch. 9), we have an interesting case. There a husband and wife, by their marriage settlement, covenanted to settle any after-acquired property accruing during coverture in right of the wife. Some did accrue which was not transferred to the trustees, but held by the husband and invested in certain securities. After the husband died the trustees of the marriage settlement claimed these securities on behalf of the widow and children of the marriage. Held, that they were entitled to them, as in equity the money became trust money from the moment it accrued, and this was known by the husband.

The case of *In re Plumptre's Marriage Settlement* (L. R. [1910], 1 Ch. 609), was cited as authority to show that all of which the husband was guilty was breach of covenant, and that the remedy on that was barred by the Statute of Limitations. But in fact *In re Plumptre's Marriage Settlement* (*supra*) had no application to the case. In that case the persons suing were volunteers. Neither they nor the trustees in their behalf had consequently any remedy in equity, since equity will not enforce a trust not fully constituted at

the suit of a volunteer. The only remedy was at law for breach of the covenant to settle, and that remedy had been barred by time.

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It would have conduced to clearness in this matter if what are called executory trusts were sharply distinguished from not fully constituted trusts. A trust is executory when it is not completely or finally declared. A trust is not fully constituted when the settlor has not vested or done his best to vest the trust property in trustees. A trust may be executory and still fully constituted. Thus a trust of a legacy "to be settled on my daughter if and when she marries," is on the testator's death at once fully constituted and executory. The importance of the distinction is, that where a trust is executory merely, that means only that its terms will be liberally construed. But if a trust is also not fully constituted, or, *in fieri*, as the elder lawyers said, it will not be enforced at all unless it is based on valuable consideration and its enforcement is demanded by a party to the consideration.

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We have in *In re Blow, St. Bartholomew's Hospital* (Governors) v. *Cambden* (L. R. [1913], 1 Ch. 358), apparently, a second *Colls* v. *Home and Colonial Stores* (L. R. [1904], A. C. 179). As in that case the Court has forgotten that, though the remedy it is giving is equitable, the right it is enforcing is a legal right, and so before the equitable remedy is given it should make sure that the legal right has not ceased to exist. If it has, clearly there is no legal right to enforce.

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In *In re Blow (supra)* an executor, acting with perfect honesty, paid away certain assets of his testator which he should have held to meet the contingent claims of certain creditors of the deceased. He had done this more than six years before action brought, so the right to charge him with *devastavit* was barred at law by 21 Jac. 1, c. 16.

The creditors then sued for administration, and the Court ordered the executor to pay into Court the money he had six years ago paid to the beneficiaries. It did this on the ground that he was not being sued for a *devastavit* and therefore 21 Jac. 1, c. 16 did not apply; and the action being for debt, therefore section 8 of the Trustee Act 1888 does not apply. What, in fact, he was doing was suing in equity in respect of a debt against a person from whom the law says he cannot recover it.

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The Judicature Act of 1873 has much to answer for in obscuring the old distinction between the exclusive and concurrent jurisdictions of equity. In the exclusive jurisdiction the Court administered equity and nothing but equity; in the concurrent, it only came in aid of law, and before it could grant its remedy in aid of the law, it had to ascertain whether the plaintiff had a claim against the defendant good in law.

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The following decisions should be noted: The fact that the settlor directs payment of income for the maintenance of a female infant till she marries or attains twenty-one, is not a "contrary intention" so as to prevent the trustees exercising their discretion under sect. 43 of the Conveyancing Act 1881, to allow the infants maintenance out of the income, between the time she marries and the time she attains twenty-one (*In re Cooper, Cooper* v. *Cooper* (L. R. [1913], 1 Ch. 350)). Funds which vest in a wife after a decree *nisi* for divorce has been pronounced and before it is made absolute, are within a covenant to settle after acquired property (*Sinclair* v. *Fell* L. R. [1913], 1 Ch. 155). The mere refusal to draw an annuity is not in itself a disclaimer of it so as to preclude the annuitant from afterwards claiming future income (*In re Young, Fraser* v. *Young* L. R. [1913], 1 Ch. 272). Lastly, a foreclosure action in respect of a

mortgage of personalty by the original mortgagee against the original mortgagor is *not* an action founded on breach of contract within the meaning of Order XI, r. 1 (e). (*Hughes* v. *Oxenham*, L. R. [1913], 1 Ch., p. 254.)

J. A. S.

## SCOTCH CASES.

The rule recognised by the writers of the old legal text-books was that an arbiter was not entitled to remuneration unless he expressly stipulated for it, the theory being that an arbiter was one who undertook a purely friendly office for the settlement of differences between persons who did not desire to litigate. *MacIntyre Bros.* v. *Smith* ([1913], 50 S. L. R. 261) has led to a reconsideration of that principle. One of the parties to an arbitration refused to pay his share of the arbiter's fee on the ground that, as no remuneration had been stipulated for, the Common-law rule applied that the arbiter in such a case must be presumed to act gratuitously. It was held, that that rule is not applicable to the modern conditions of business, and that a professional man can no longer be presumed to give professional services gratuitously.

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In *O'Neill* v. *John Brown & Co.* ([1913], 1 S. L. T. 211) the Court had again to consider the effect of a workman's refusal to undergo an operation, on his right to continue to be paid compensation. The facts were that the operation was admittedly simple and unattended with risk, and the workman was well and strong. He averred that he personally was willing to undergo the operation, but two qualified medical men advised him not to undergo it as it would not lessen his incapacity in any way, and he therefore refused to submit to it. Was such refusal reasonable? Counsel for the workman strove to establish the proposition that if a man in *boná fide* refuses to undergo an operation upon the advice of a qualified medical practitioner, that must be taken

as a complete answer to any suggestion that he is unreasonable in refusing to undergo it. The Court declined to countenance such a doctrine, for "if such were laid down this part of the Act would really become a dead-letter, because in the wide world of medicine it would almost always be possible to obtain a perfectly genuine, though eccentric opinion from some qualified medical man to any effect that might be desired, within limits."

Proceeding to examine the facts of the case before them, the Court found that all the medical men concerned, those advising the workmen (two in number) as well as those advising the employer (three in number), were agreed that the operation would not be attended by any risk or danger, and that at the worst no material harm could come of it, though the workman's doctors took the more pessimistic view that no good was likely to result from an operation. Thereupon, after reviewing the whole medical evidence and the circumstances, they further found that there was a reasonable certainty that, as the result of the operation, the man's wage-earning capacity might fairly be ascribed to his refusal to undergo the operation, and that such refusal was unreasonable. In consequence of that finding, the compensation hitherto paid to the workman was ended.

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In the case of *Gibb* v. *The Edinburgh and District Tramways Company* ([1913], 1 S. L. T. 144), there is an interesting reference to the relation of contributory negligence to primary negligence in actions of reparation. The argument for the pursuer was one which, in brief, embodied the theory fairly deducible from certain recent decisions in the English Courts, namely, that an injured person cannot be responsible for contributory negligence if the primary negligence was of such a character that it was continuous before, during, and after the accident. The Court have definitely discountenanced that theory in the case mentioned, being of opinion that the authorities do not justify it.

The National Insurance Act 1911, s. 66 (1) enacts, "If any question arises . . . . (c) as to the rates of contributions payable in respect of an employed contributor by the employer and the contributor respectively, the question shall be determined by the Insurance Commissioners in accordance with regulations made by them for the purpose." A firm of employers brought an action for reduction of a determination of the commissioners, fixing the rates of contributions payable by the pursuers and one of their employees respectively under Part I of the National Insurance Act 1911. It was not averred that the Commissioners had refused to hear parties, or that they had acted otherwise than in good faith in determining the question. It was held (*Don Bros., Buist & Co. Ld.* v. *Anderson and Others* [1913], 50 S. L. R. 361), that the Court had no jurisdiction to interfere with the decision of the Commissioners, and action dismissed.

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Another public statute (The Finance Act 1909–10) has likewise been the subject of a judgment of extreme intricacy in *Commissioners of Inland Revenue* v. *Walker* ([1913], 1 S. L. T. 309). It will be remembered that that statute provides a system of bringing cases before a statutory official known as a Referee, and he may state a case for the opinion of the Court of Session. In the decision mentioned, which was brought up under such procedure, it was held (1) that the Referee was entitled to find that part of the price paid for certain subjects was "attributable to a personal element," and (2) that the deductions allowed to be given from total value in order to bring out site value are not necessarily those allowed in the original valuation made as at 30th April 1909, but must be ascertained afresh on the occasions on which Increment Value Duty is to be collected.

D. M.

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## IRISH CASES.

The question of the validity of the condition of sale which was challenged in *In re Biggs-Atkinson & Ryan's Contract* [1913], 1 Ir. R. 125, depends upon the extent of the incidental powers given by the Settled Land Act to a tenant for life in carrying out his statutory power of sale. The lands in the present case were subject to a rent-charge. The tenant for life put them up for sale by private treaty in six separate lots. A condition of sale provided that each lot should be sold subject to the entire rent-charge, but should be primarily liable only for an apportioned part thereof; that the purchaser of each lot should covenant for the payment of such apportioned part, and for the indemnity of the other lots as regards such apportioned part only, and should charge all moneys payable on foot of such covenant on such lot; and that the vendor, for the purpose of this condition, should stand in the place of, and be deemed to be, the purchaser of any unsold lot or lots. The purchaser of one lot objected that the Settled Land Act did not empower a vendor to give such a rent-charge as was proposed in respect of the unsold lots. The Court, however, held the condition of sale valid, considering that the case was really covered by *In re Judd & Skelcher & Poland's Contract*, (L. R. [1906], 1 Ch. 684). The condition proposed was thought to be, in Ireland, an ordinary mode of carrying out such a sale.

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Whether the decision in *Grace v. Walsh* ([1913], 1 Ir. R. 69), is right, even on its special facts, may be doubted; but it seems clear that the case can be of little use as a general authority. A will contained the following investment clause: "My trustees being at liberty to sell all my ships, houses, and invest same as they think most desirable, but not in the British funds; my trustees to be free from all liability in investing any of the money received for the sale of any of my property." It was held, that this curious clause authorised

the trustees to invest the proceeds of sale in the purchase of freehold lands in England or Ireland. No doubt sect. 1 (*b*) of the Trustee Act 1893, gives trustees, unless expressly forbidden to do so, a power to invest in "real securities," but this has always been taken to mean only an investment upon mortgage. Our old friend Snell (*Equity*, 16th ed., p. 121) states simply: "A power to invest in real securities does not, of course, authorise the trustees to invest in the purchase of lands, because that is an alienation out and out of the trust property; and for such an alienation an express power is required." If the present decision is to be supported, it can only be by giving an unusually wide effect to the words "as they think most desirable," and to the words importing complete freedom from liability for any investment; and even so, there still remains the uncomfortable question, was this an *investment* at all? On the whole, the case seems one which might have been better left unreported.

The Court's power of giving leave to issue a writ for service out of the jurisdiction is, as everyone knows, confined strictly to the classes of cases mentioned in the Rules of Court (Ord. XI, R. S. C. Ir.). It is decided in *Clare Co. Council* v. *Wilson* ([1913], 2 Ir. R. 89) that the power does not exist in the following case. The Public Roads (Ireland) Act 1911, enables a county council to bring an action to recover extraordinary expenses necessary for repairing roads, by reason of damage caused by excessive user of the roads; and that Act makes the person guilty of such excessive user liable to recoup such expenses. An Irish county council wished to bring an action, under this Act, against a person resident in Scotland: *held*, that the leave of the Court to issue and serve the writ out of the jurisdiction could not be given. Two clauses of Ord. XI, r. 1, were suggested as applicable. Clause (*f*) gives jurisdiction where a contract,

which is sought to be enforced or otherwise affected in the action, or for the breach whereof damages or other relief is or are demanded, was made or entered into within the jurisdiction. The liability here was held not to be in contract, express or implied: it was a statutory liability, and more akin to a tort than a contract. Again, clause (*b*) applies where any act, deed, obligation or liability, affecting lands within the jurisdiction, is sought to be enforced in the action. But the liability here did not *affect* lands, any more than trespass or nuisance could be said to be a liability affecting lands.

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The case of *Cronin* v. *O'Connor* ([1913], 2 Ir. R. 119), presents a curious state of facts, apparently uncovered by any previous direct authority. The owner of lands had a right of cutting and saving turf on a plot of an adjoining bog. This plot was not fenced or divided off from the rest of the bog. The man who owned the soil and freehold of the bog depastured cattle upon it; they did harm to the turf which was cut and spread upon the plot in question; the bog-owner had made no provision for preventing such damage by his cattle to the turf. The person entitled to the right of turbary sued the bog-owner for trespass, and it was held that the action would lie. The wrong consisted in an unreasonable use of one's own property, having regard to the dominant tenant's *profit à prendre*. There are, said the Court, two rights in the one subject-matter: the natural right of the owner of the bog to the soil and freehold, and the incorporeal right in the nature of a profit vested in the plaintiff, in respect of the same bog; which is to give way? Evidently, if a *profit à prendre* is founded on an implied grant, and if a man may not derogate from his own grant, the general rights of the servient owner must give way so far as is necessary for the due enjoyment of the particular right of the dominant owner.

J. S. B.

# Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

*The Middle Temple Bench Book.* By A. R. INGPEN, K.C. London: Published by order of the Masters of the Bench. 1912.

The groundwork of this sumptuous and entertaining book is the result of a careful study of the records of the Middle Temple. To the main source there came a valuable supplement in the discovery of a MS. written about 1634 by Sir Robert Brerewood, a Reader of the Inn in 1638, which was acquired by the Attorney-General, Master Sir Rufus Isaacs, and presented by him to the Bench, the successors of that body "best and most apt for their learning and skill" selected in 1292 by an Ordinance of King Edward I. From these documents Master Ingpen, K.C., by the application of great learning and enthusiastic labour, has rescued from oblivion "ancient customs for the most part forgotten." So rich and suggestive is the store from which he has gathered what is now published, that "it has been necessary to restrict the historical information, otherwise there is material for a compilation of a domestic history of England," for "the surroundings show the condition and growth of society during the successive periods" recorded in the documents. So that though Wat Tyler in his natural hatred of law and lawyers burnt in 1381, when he paid his visit to the Temple, all the chronicles he could find, much remains though much is lost. The lands which the two Temples own, of which the part belonging to the Middle Temple joins together the boundaries of the Cities of London and Westminster, were beyond his power of destruction, and it is close on 800 years since the Knights Templars acquired them and built the famous church in which service has probably continued without a break till to-day. The portraits of illustrious members of the Society included in the book, are of considerable merit. So interesting in all respects is the work, that the gratitude of every member of the House is due to the distinguished Master by whom its publication has been made possible.

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*Roman Laws and Charters.* By E. G. HARDY, M.A., D. Litt. Oxford: The Clarendon Press. 1912.

This is a work of high scholarship. It is a rendering of a selection from Brun's collection of inscriptions on bronze tablets

found in various parts of Italy and Spain in the course of excavations and demolitions through a long series of years. These inscriptions relate generally to municipal laws and throw interesting lights on urban administration. Owing to the great antiquity of the tablets and their careless abandonment, except in one case, fragments only of most of them have been recovered, and naturally in these there are many *lacunæ*. But what has survived is of great interest, and this interest is much enhanced by the learned Translator's brilliant Introductions to the several laws. The work was undertaken primarily for candidates for classical Greats, but it will be cordially welcomed far beyond the bounds of the University.

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*The Law of Damages and Compensation.* By F. O. ARNOLD, M.A., B.C. London: Butterworth & Co. 1913.

Lord Halsbury is little disposed to magnify the perplexities of any branch of law which is submitted to his determination, and anyone who has had to form an opinion on cases, other than the simplest, which come within the subject of which this book treats, will concur with his statement that "the whole region of inquiry into damages is one of extreme difficulty." One of the difficulties which the Author has had to surmount is the arrangement of that part of the subject dealing with individual and particular branches of it; and he has sought, with respect to this as well as to the whole matter, to set out in the mode best adapted to ready reference, a concise statement of the law. The book gives evidence of great thought and care in its preparation, and deserves a prominent rank amongst those which a searcher for confirmation, or otherwise, of his own impressions might with advantage consult. Space is economised by giving in the footnotes a single reference only to cases quoted, leaving to the Index of Cases a full direction to the contemporary reports.

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*Statute Law Making in the United States.* By CHESTER LLOYD JONES. Boston: The Boston Book Company. 1912.

The Author may be right in stating that the facility for passing new Statutes and changing old ones is greater in the United States than elsewhere, but in our own land, which is more within the atmosphere of precedent, there is sufficient ease, by Parliamentary ingenuity, in enacting novel measures "which touch us more and more intimately in our daily lives." Immature measures "throw

upon the Courts a burden of judicial interpretation", and as the object of the learned writer, who is Professor of Political Science in the University of Wisconsin, "is to outline the means by which this defect may be avoided," the able treatise which he has produced might with great advantage be read by our legislators in intervals between divisions. The Preamble of a Bill, it seems, is abandoned in many of the American States, and the Author predicts its total disappearance, as Preambles are not, properly speaking, parts of an Act. The book is excellently planned and is excellently expressed.

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*Anecdotes of Bench and Bar.* By A. H. ENGELBACH. London: Grant Richards. 1913.

*Legal Levities and Brevities.* By C. HARRISON, M.A., LL.B. Cambridge: Heffer & Sons. 1913.

A well-known Lowland Scottish laird was once asked his opinion as to the merits of a certain item in the menu of a dinner at which he had been a guest, to wit, a sheep's head, and replied that, "it contained a fine confused mass of eating." That criticism might well be applied to *Anecdotes of Bench and Bar.* Some of the stories are good, some are poor, and some have been assigned to persons other than those to whom they are generally attributed. The Introduction by Mr. F. E. Smith is, perhaps, hardly up to his usual standard of brilliancy.

*Legal Levities and Brevities*, to borrow a theatrical simile, "goes with a roar" from beginning to end. It is stuffed with good things and is an excellent parody, in verse, on the usual law book. The illustrations by Mr. W. H. Toy are screamingly funny, especially the one entitled "Self-Defence." Both books will help to while away some of the tedious hours expended by youthful members of the Bar in "waiting for Briefs," and will help to instil the "atmosphere" surrounding the Legal Profession.

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*A History of French Private Law.* By JEAN BRISSAUD. Translated by R. HOWELL. London: John Murray. 1912.

This is the third volume of a series designed to make the English-speaking peoples familiar with the history of the legal systems of the Continent: or rather of three such legal systems, those of France, Germany, and Italy. It consists, in the main, of a translation of the History of French Private Law by the late Professor Brissaud, of Toulouse, who died in 1904, at the age of 50. There are, however,

no less than three Introductions—by the Editorial Committee of the Association of American Law Schools, who appear to be responsible for initiating the enterprise; by their Chairman, Professor Wigmore and by Professor Holdsworth. Also, there is prefixed to the volume Brissaud's general dissertation on the primitive history of legal institutions, which (*pace* Professor Holdsworth) appears here entirely out of place. Brissaud's method was to trace the history of each institution severally. Since legal institutions interact so intimately on one another, this results in a somewhat dry and jejune discussion: and the translation is far from elegant. Also the Index is scanty for a volume of nearly 900 pages.

Beyond this, however, fault-finding cannot go. The enormous learning of Brissaud is evinced by his copious references, not only to French, but to many other authorities. It should be noted, however, that he deals, like all historians of law, much more fully and lovingly with the early history than with anything which occurred after A.D. 1400. The chapter on "Offences," makes specific mention of nothing later than Loysel; so that we must compare the work rather with Pollock and Maitland's than with Professor Holdsworth's. And if we call this a French "Pollock and Maitland," our readers will understand its importance.

One may rather wonder what Professor Wigmore means by "the formal, lifeless treatment of the legal historians of fifty years ago." Does he include Ortolan and Brougham?

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*Pitman's Dictionary of Secretarial Law and Practice.* Edited by PHILIP TOVEY, F.C.I.S. London: Sir Isaac Pitman & Sons. 1913.

Few Secretaries to Companies can consider their library complete without possessing a copy of this work. The list of Contributors comprise such names as Mr. Gore-Browne, K.C., Mr. W. N. Hibbert, Mr. M. W. Jenkinson, and many others well known in legal and commercial circles. In modern times a Company Secretary has to be a veritable encyclopædia of legal and commercial knowledge, and a work to be useful must comprise a wide range of subjects. To enumerate the subjects dealt with could not be done within the narrow limits of a review, so we will content ourselves with indicating some that appear to be pre-eminently thorough. Conversion of a Business into a Company is a heading which speaks for itself, and is written in simple and informing language. Directors, liability of, gives all the information necessary to keep those august

individuals on the *qui vive* as to their duties and obligations. A distinct novelty and a sign of the times is the article dealing with the Lady Secretary. The hints on organisation of a secretary's office are instructive and abounding in common-sense. We conclude that the articles dealing with Trades Unions and all subjects germane thereto, are written by Mr. H. H. Schloesser; and if our surmise is correct, that gentleman shows a very comprehensive knowledge of the subject. It must not be thought that, because we have picked out these two or three subjects, they are the only good things contained in the book. The laws of the Colonies and Foreign lands are dealt with where they affect English Companies, and in this respect we would venture a criticism. The article headed "South Africa, Company law in," requires considerable amplification and revision. In the first place South Africa comprises four Colonies, each with its separate body of Company law:—1. Cape Colony; 2. Transvaal; 3. Natal; 4. Free State, and not Orange River Colony as herein stated. Secondly, with regard to the Transvaal, if Chapter V of Act No. 31, 1909, section 198 is carefully read, it will be seen that that section applies to "Every foreign company (*other than a banking company or insurance company as hereinafter defined*)" an important exception omitted in the Dictionary. By sub-section (5) a banking company is *stated to be* subject to Law No. 2, 1893, and amending Acts; an insurance company is stated to be subject to Law No. 8 of 1898 and amending Acts. The Dictionary is replete with excellent forms, of which there is an Index at the commencement. Legal authority is given throughout the text whenever necessary, and a requisite Index of Cases appears at the beginning. In future editions, we would suggest, that in the Index there should also appear the references to Reports; it saves double reference in many instances. In the Appendix is set out the Companies (Consolidation) Act (8 Edw. VII, c. 69) a very useful addition. The supervision of such a mass of detail, dealt with by so many hands, calls into play careful accuracy and powers of co-ordination, upon the possession of which, in a high degree, Mr. Tovey is to be sincerely congratulated.

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*The Law of Rating.* By HERBERT DAVEY. London: Stevens & Sons. 1913.

Rating is such a technical subject, and there have been so many well-known writers on it, that a new comer must of necessity be judged by a very high standard. Let us say at once that Mr. Davey

emerges well from the ordeal. The Introduction, which is historical, strikes us as being strikingly efficient. The text is divided into two Parts, with twenty-five chapters in the first Part and six in the second. In the chapter dealing with Licensed premises, the subject is remarkably well handled. The chapters treating of Procedure in Part II, display the practical knowledge possessed by the learned Author. There are two Appendices, the first one contains the Statutes and the second Orders regulating Metropolitan Appeals. The Index is well constructed, and the Tables of Cases and Statutes are complete. The whole scheme of this work is commendable, and it will undoubtedly prove a valuable addition to any legal library.

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**Second Edition.** *The National Insurance Act 1911.* By ORME CLARKE. London: Butterworth & Co. 1913.

The first edition of this work, which had the imprimatur of the Solicitor-General, was reviewed in our issue for May 1912. In the Preface to that edition the Author allowed himself the wide but fallacious hope that the Act might be "of pleasant interest to nearly all the inhabitants of the United Kingdom." It was, then, as he himself said, "in many respects a skeleton, and an immense amount of detail was left to be filled in by regulations." This of course made it evident that a new edition would be called for at an early date. In the short period of twelve months this necessity has arrived. The new issue is not merely a reproduction of the first with just the regulations added, for the text has been revised and the task achieved of incorporating the relevant cases decided in 1912. It will be of much greater practical use than the first one, and is in all respects an excellent work.

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**Fifth Edition.** *Imperatoris Justiniani Institutionum.* By J. B. MOYLE, D.C.L. Oxford: The Clarendon Press. 1913.

This is a beautiful volume, which would be a most desirable addition to any library. So choicely is it produced, that it is a pleasure to turn over its pages. But the perfection of the fabric and the workmanship is no more than appropriate to the comprehensive learning which embellishes the text. In this letterpress the learned Editor has adopted the excellent plan of printing in a thicker type those passages which Justinian has substantially taken from Gaius, and thus instantly calls attention to the numerous instances in

which Tribonian "cribbed" from the earlier writer. This visible aid brings to the mind more prominently than any other system would, the connection between the two Authors separated from each other by a space of nearly four hundred years. The Introduction which Dr. Moyle has written, and his comments on the text, are in the highest style of scholarship. Excursus 4 on *bonorum possessio*, which is the only one there has been time to read through, is a piece of brilliant criticism. Altogether this edition of the *Institutes* is the best we have met with.

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**Sixth Edition.** *Bunyon's Law of Fire Insurance.* By R. J. QUIN. London: C. & E. Layton. 1913.

This edition brings up to the present year a work of long-established repute, the original Author of which had extensive and special experience in fire insurance matters. Of course, since that distant day, much has arisen to multiply the perils and anxieties, and in some respects to radically change the obligations of insurers. The change in these conditions has from time to time demanded revision of the work. And now, the learned Editor has apparently been compelled to practically re-write much of even the preceding edition, though without altering the well-known scheme of the work. The very able Introduction which he has supplied is a summary of the whole of the present law and practice of this essential adjunct of the enterprise of the civilised world, and would of itself alone furnish a sure foundation for a working knowledge of the subject, but taking it with the bulk of the volume, the two together form a treatise which is complete.

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**Seventh Edition.** *A Manual of the Principles of Equity.* By CHARLES THWAITES. London: Geo. Barber. 1913.

This manual, which is much used by candidates preparing for law examinations, has now reached a mature age, and has passed through the ruthless test of experience during many years. As the information which it furnishes has been confirmed or amended under many revisions by competent revisers, it is probable that full confidence may be felt in all its statements. As to the useful feature of an ample Index, the Author announces that he has endeavoured to supply one that will prove thorough and complete. The work has been written up to the present year, so that it has a deserved inheritance of favour.

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**Eighth Edition.** *Coote's Law of Mortgages.* By S. E. WILLIAMS. London: Stevens & Sons. 1912.

Few people realise how intricate the Law of Mortgage is, until they come to study a treatise on the subject. *Coote* stands well in the front rank of authority, and the present edition well maintains its position. Divided into two volumes, nine Parts and sixty-five chapters, it is easy to estimate the amount of thought and learning which must have been expended by the Editor. Thoroughly brought up to date, the decisions include those reported in September 1912. A subject of this nature is bound to have much legislation affecting it, mortgage comes so much into the every-day commercial life of the nation. Charges for the cadet branches of great families, jointures, and the charging of life and other estates. Bills of sale, mortgages of ships, policies of life assurance, and of stocks and shares. Powers to mortgage possessed by married women, tenants in tail, executors and trustees; by municipal corporations and companies. This short enumeration of a minor portion of the wide range of subjects dealt with, shows that the hand of an expert must be employed. Mr. Williams possesses all the qualifications essential to the post, in addition to which, we like the undaunted manner in which he often gives vent to his own personal opinions, even when opposed to high judicial decision, without for a moment disguising the fact that it *is* his own opinion and *is* opposed to that of the Bench.

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**Forty-fifth Edition.** *Stone's Justices' Manual.* Edited by J. R. ROBERTS. London: Butterworth & Co. 1913.

It is impossible to find new terms in which to express one's admiration of this work, or to describe how well-established its reputation is. In fact, it is hard to realise how Magistrates rapidly and accurately got through their work before it was issued. It is sufficient, then, to mark the new points which arise since the appearance of the last edition. This is the age of voluminous and slipshod legislation, and the year 1912 was no exception. Take, for instance, the Protection of Animals. In 1911 an Act was passed by which the penalty for cruelty to animals was increased from three to six months (1 & 2 Geo. V, c. 27). This, of course, allowed a claim by the defendant to trial by jury (42 & 43 Vict., c. 49, s. 17). In 1912 an amending Act was passed reverting to the original penalty of three months (2 & 3 Geo. V, c. 17).

So far so good, but for Scotland an Act was passed in 1912, identical in terms with the English 1911 Act. We have therefore a penalty of six months for cruelty to animals when taking place in Scotland, whereas if the same offence takes place in England, the penalty is only three months! Chaos has also been created by reason of the vague terminology of 2 & 3 Geo. V, c. 20 (Criminal Law Amendment Act 1912), as *explained* by a Circular letter dated December 17th 1912, issued by the Home Office. Everybody is familiar with the confusion and injustice brought about by the terms of the Shops Act 1912 (2 Geo. V, c. 3). Other important legislation which is noted consists in the Coal Mines (Minimum Wage) Act 1912 (2 Geo. V, c. 3), and legislation dealing with the Army, Finance, and Seal Fisheries. There are over one hundred and sixty new decisions to be digested by those who wish to keep abreast of Magistrates' law, in several of which the learned Editor has had the satisfaction of seeing opinions of his, expressed in former Editions, upheld by the Courts. Some of these decisions are not cited in the Reports, but appear in newspapers, a fact which shows how watchful an eye Mr. Roberts has for every point which affects his special subject. *Mathews* v. *Mathews* (L. R. [1912], 3 K. B. 91) was an important decision upon the payment of arrears for weekly payments under an order, in pursuance of the terms of the Summary Jurisdiction (Married Women) Act 1895 (58 & 59 Vict., c. 39, s. 5). *Morris* v. *Godfrey* (106 L. T. 890) dealt with the vexed question of Whist-drives; the Police have now issued suggestions warning the unwary of the pitfalls at their feet. In *Bartlett* v. *Parker* (L. R. [1912], 2 K. B. 497), is defined the operation of sect. 41 of the Lotteries Act 1823 (4 Geo. IV, c. 60). The range of decision is very wide, including as it does such subjects as National Insurance and Licensing. The present Edition shows the wonderful grasp of detail and breadth of view possessed by the learned Editor, who has once more had the valuable assistance of Mr. H. O. Roberts, the Deputy Clerk to the Newcastle Justices.

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*The Annual Licensing Practice 1913.* By R. M. MONTGOMERY, M.A., assisted by E. A. PARRY. London: Sweet & Maxwell. 1913. —Though this book is now entitled an Annual Practice, it is, in fact, the sixth edition of the Editor's work on Licensing Laws; and on that work numerous improvements seem to have been made. Amongst them is the arrangement in chapters of a number of

matters implicated in the Licensing Consolidation Act, or having a contact with it, that, without such indication as is given by the work, would not readily be apparent. As instances of these may be mentioned excise licences, cinematograph exhibitions, and the registration of clubs. The notes to sect. 87 of the Act, together with their application to one of the cases in the Fourth Schedule, numbered 6 by the Author at page 118, are quite elucidatory, and the book all through will render useful help to a careful reader.

*The Law and Practice of Town Planning.* By R. A. GLEN and A. D. DEAN. London: Butterworth & Co. 1913.—Although this is a branch of Local Government law and practice so new that no scheme of town planning has yet been approved, the Authors have felt that the time is ripe for the publication of a book devoted to the subject. Such a work concerns owners and occupiers of land and the members and officials of local authorities, and as the Act is law through the whole of Great Britain, the area of interest is wide. If the work supplies, as the Authors claim that it does, all the legal and other useful information available on the subject, it cannot fail to be of considerable practical value. They have, undoubtedly, as the book affords instant evidence, sought information from many sources on a variety of subjects important but not easily attainable.

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*The Panama Conflict.* By L. OPPENHEIM, M.A., LL.D., Cambridge: The University Press. 1913.—It would seem almost impossible to give a thorough exposition of the difference agitating the United States and Great Britain regarding the Panama tolls in a compass of 57 pages of large print. The writer of this little pamphlet has, however, accomplished the feat, with great learning and acuteness. Some exception might be taken to his mode of stating the historic data: thus there is not to be found in the Clayton-Bulwer Treaty any clear regulations with regard to "a future Panama Canal" as quoted by him.

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*Butterworths' Yearly Digest 1912.* Edited by H. CLOVER. London: Butterworth & Co. 1913.—This is the yearly supplement to the *Ten Years' Digest*, published by the same firm, and includes cases decided towards the end of 1912, but not yet fully reported. The volume therefore is as nearly up to date as is possible.

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*Butterworths' Twentieth Century Statutes 1912*. Edited by H. H. KING. London: Butterworth & Co. 1913.—This volume gives the full text of the King's printers' copies of the Public General Acts of the year, with some very able and suggestive notes by the Editor. And in the course of preparing these he has had occasion to emphasise the unhappy fact that "several enactments appear to be hopelessly unintelligible or obscure in their practical effect." To a section of one of these he quite justly says "the more it is studied the more hopeless its interpretation becomes." These notes, though they cannot make clear the incomprehensible, will assure the reader of the statutes that he is not alone in his perplexity.

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*Mews's Digest of English Case Law*. 2nd Annual Supplement, 1912. By JOHN MEWS. London: Sweet & Maxwell. 1913.—This volume has all the features of the well-known and highly valued *Digest* to which it is the supplement for the past year. The List of Cases which during the year have been commented on favourably or otherwise, printed as it is on one side only of the paper and issued separately from the bound volume, is exceedingly useful for noting up.

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*The Law of Copyright*. By J. B. RICHARDSON. London: Jordan & Sons. 1913.—The Act of 1911 has increased the complication of Copyright law, and will keep it complicated until time shall make the old law obsolete. A treatise, therefore, on Copyright in its present condition, and on its shield over original productions other than literary, will certainly be received with satisfaction. This one seems to be well arranged and well written; and its interest and usefulness are much enhanced by an Introduction treating of the problems which may arise while the 1911 Act is only partially dominant, and enhanced perhaps even more by an excellent history of the whole law of the subject.

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**Second Edition.** *Voluntary Liquidation*. By J. P. EARNSHAW. London: Jordan & Sons. 1913.—The design of this work is to afford a practical and handy guide to voluntary liquidators; and as the original text has in this edition been revised and amplified, and as new chapters on important matters have been added, the book has every promise of fulfilling its purpose. Great care has evidently been given to its preparation.

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**Third Edition.** *The Handy Book to Solicitors' Costs.* By A. C. DAVES. London: Sweet & Maxwell. 1913.—To give this book more the character of one that furnishes precedents of bills of costs, the Author has re-modelled on a new principle and re-written the previous edition, so as to introduce useful Tables of steps in actions in Chancery, the King's Bench, and the Probate, Divorce, and Admiralty Divisions, and in County Courts and the Lord Mayor's Court; and there seems to be a sufficient and well-considered supply of these.

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**Thirteenth Edition.** *Workmen's Compensation Act 1906.* By W. A. WILLIS, LL.B. London: Butterworth & Co. 1913.—The plan of the previous volume is adopted in this, but some useful additions are made. Not only are such of the cases in England, Ireland and Scotland as are reported as late as the middle of December 1912 incorporated, but there is also inserted at page 207, that important sect. 11 of the Insurance Act, with some notes upon it, and at page 350, the Government Annuity Table, which is convenient, as it enables consideration to be at once given to questions on this point without seeking solution in a separate publication.

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Books received, reviews of which have been held over owing to pressure on space.—Bentwich's *Leading Cases and Statutes on International Law*; Chalmers and Owen's *The Marine Insurance Act 1906*; Slater's *Arbitration and Awards*; Moulton's *Letters Patent for Inventions*; Choate's *The Two Hague Conferences*; Tarde's *Penal Philosophy*; Gibson's *Conveyancing*; Shearwood's *Bar Examination Papers*; Collins' *Leasehold Enfranchisement*; Dean's *Students' Legal History*; Healy's *Stolen Waters*; Hopkins' *Wards of State*; Wilshere's *Procedure in the King's Bench Division*; Tyabjis' *Principles of Muhammadan Law*; Thomas' *Leading Cases on Workmen's Compensation*; *Butterworths' Five Years' Digest*; Oppenheimer's *Rationale of Punishment*; *Classics of International Law*; *Every Man's Own Lawyer*; Fox's *Handbook of English Law Reports, Part I*; Atkinson's *Magistrate's General Practice*; Wolstenholme's *Conveyancing*.

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Other Publications received:—*Quarterly Digest of Reported Cases* (Butterworth & Co.): Cohen's *Spouse-witnesses in Criminal Cases* (Stevens & Haynes); Borchard's *Bibliography of International and Continental Law*; *Report of the American Bar Association, Vol. 37*; Bogli's *Beitrage zur Lehre vom ius gentium der Römer*; del Vecchio's *Uber Einige Grundgedanken* and *Sui Caratteri Fondamentali della Filosofia*; Graziano's *La Difesa Penale*; Jordan's *Promotion, &c., of Limited Companies.*

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The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Juridical Review, Law Times, Law Journal, Justice of the Peace, Law Quarterly Review, Irish Law Times, Australian Law Times, Canada Law Journal, Canada Law Times, Chicago Legal News, American Law Review, American Law Register, Harvard Law Review, Case and Comment, Green Bag, Madras Law Journal, Calcutta Weekly Notes, Law Notes, Law Students' Journal, Bombay Law Reporter, Medico-Legal Journal, Indian Review, Kathiawar Law Reports, The Lawyer* (India), *South African Law Journal.*

THE

# LAW MAGAZINE AND REVIEW.

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## I.—PRISON REFORM.[1]

THE three books referred to as forming the text of this Article do not stand quite on the same footing. The third is one of a series now being published by the American Institute of Criminal Law and Criminology in pursuance of a resolution that it being "exceedingly desirable that important treatises on criminology in foreign languages should be made readily accessible in the English language," a Committee should be appointed to "select such treatises as in their judgment should be translated, and arrange for their publication." That this design is a good one will be generally admitted, and the work of the late Professor Tarde is well worthy of the place which it occupies in the list. Four of its predecessors are mentioned by Mr. Tighe Hopkins. Professor Tarde was acquainted with an enormous number of books on the subject, and was a keen critic of the current theories. His work, however, takes a much wider scope than that of Prison Reform, and, moreover, it can hardly be regarded as up to date. It was published in 1890, and though there was a second

[1] *Wards of The State.* An Unofficial View of Prison and The Prisoner. By TIGHE HOPKINS. London: Herbert and Daniel. 1913.

*The Rationale of Punishment.* By HEINRICH OPPENHEIMER. London: Hodder and Stoughton. 1913.

*Penal Philosophy.* By GABRIEL TARDE. Translated by RAPELJE HOWELL, of the New York Bar. London: William Heinemann. 1912.

edition (used by the translator) in 1903, the changes do not appear to have been considerable. The author died in 1904. The book, in addition to the statement and discussion of theories, contains a vast collection of matters of fact, whose accuracy may not be equal to their number. There is certainly a serious error when he writes of "the thousands of thieves hanged yearly on the gallows of England within the last half-century" (p. 222). Here is what I find in Sir E. DuCane's treatise on the subject. "In 1833 the number of executions in England and Wales was 52; in 1831 it was 68. In 1836 it had fallen to 17, and from then to the end of 1883 there have been in 47 years 557 persons executed, or an average of 12 a year only"—nearly all of whom were murderers. He tells us indeed that "in 1836, 1837 and 1838, there were 954 sentences of death, but only 31 executions," but even the sentences during three years did not reach 1,000. I may further add that Dr. Oppenheimer has studied Professor Tarde's work and discussed some of his theories, which renders it less necessary to deal with them specially. The treatises of Mr. Tighe Hopkins and Dr. Oppenheimer have the advantage of being up to date, and they are also less multifarious in their contents, the former being better suited for the "man in the street," while the latter will be regarded as more satisfactory by the jurist and philosopher. It may be remarked, however, that as regards the recent Prevention of Crimes Act, Mr. Hopkins quotes pretty largely from an Article which he published while the Bill was before the House without noting the respects in which it was subsequently altered in Committee.

Coming to our main subject, imprisonment as a punishment, it is only of comparatively late years that imprisonment has come largely into use for this purpose in England and in most other countries. During this time we have had in England a representative Government whose aim was (or

ought to have been) the public good, and who were bound to use imprisonment for this object. Previous to this the main object of imprisonment was not punishment but safe custody—partly of untried persons, and partly of convicted persons, during the interval between sentence and execution, which latter usually took place outside the gaol; and sometimes also of persons against whom there was no definite charge, but whom it was thought dangerous to leave at liberty. Persons have been imprisoned for this latter reason in our own time (the Habeas Corpus Act having been suspended for the purpose), but such imprisonments have been much more prevalent on the Continent than here. We have also still some debtors in our prisons, though it is hoped that we will soon see the last of them. Formerly there were special prisons for debtors, and means were provided by which insolvent debtors could, on giving up whatever property they possessed, be liberated without paying their debts; but these distinctions between debtors and criminals have practically disappeared. The present law of debtors, however, was passed at a time when the public good was regarded as the great principle of all legislation, and the same principle ought to be our guide in amending this branch of law. The reasons for a certain amount of severity in the punishment of crime are not applicable when no crime has been proved, and imprisonments when not intended as punishments should be as lenient as possible. A man awaiting trial in prison and a man awaiting trial out of prison (having given bail) should be treated alike, save as regards any precautions that may be needed for the safe custody of the former, which can hardly be said to include opening and reading all his letters and overhearing all his conversations. Imprisonment of a debtor is sometimes defended as imprisonment for contempt of Court, and that a Court of Justice should sometimes be able to imprison a man for wilful disobedience to its orders is no doubt for

the public good. But the object of requiring a judgment to be obtained by the creditor before imprisoning the debtor for non-payment of the debt was merely to make sure that the debt was really due; and where this could be otherwise ascertained, as when it was due for rates or taxes, no judgment was required. The idea of providing an excuse for this imprisonment by being able to describe it as imprisonment for contempt of Court seems not to have occurred to the framers of the Debtors Act of 1869. But when the Legislature decided to add ability to pay to the obtaining of a judgment as a condition precedent to obtaining a committal order, it should have gone on to require strict legal proof of this ability—such proof as would be required if non-payment, coupled with ability to pay, had been made a crime. And the State should not permit itself to be made the agent for inflicting a punishment at the option of a private individual who may be expected to use that option for his own benefit and not for the public good.

The punishment of crime by the State—which now consists chiefly of imprisonment or something done in prisons—is not an end but a means—a means of protecting the public against crime. This seems to me to follow from the principle that the public good is the chief object which the Legislature should have in view, and I think, if the leader of any political party were to avow that this was not the principle on which he acted or intended to act, he would soon find himself without a following. Those, however, who desire to read a full discussion of this subject, will see the principal arguments of the Vindictivists stated and refuted in the pages of Dr. Oppenheimer's book. I was glad to find this theory of punishment adopted by Sir Robert Anderson in his late work: *The Lighter Side of My Official Duties*. He there writes (p. 267): "We need to shake ourselves free once for all from the stupid and cruel punishment-of-crime system—an evil legacy of the Pagan

codes on which our laws are based—and to recognise that punishment is merely a means to an end, and that the great end to be kept in view is the protection of the community. And this being so, the proper function of a Criminal Court is to deal with the offender in whatever way the interests of the community require." But Sir Robert has not added an important qualification which is thus stated by Dr. Oppenheimer: "While sanctions are worse than useless, unless they are of sufficient severity to act as checks on crime, they ought not to be more than sufficient for the purpose. The true function of punishments assigns the limits of their severity. If the State can attain its end—the prevention of offences—by a mild penal system, there is no justification for a savage code. For punishment means pain, and humanity forbids us to inflict unnecessary pain on any sentient creature" (page 285). Our author, however, is by no means a thorough-going humanitarian. He ascribes the movement for the abolition of the death penalty for murder, to "sickly sentimentalism," but he recognises the duty of protecting the public at the least cost in pain, suffering, or discomfort, and if he had inquired further, he might perhaps have found that the only difference between him and the "sickly sentimentalists," was as to whether anything short of the death penalty could give the public adequate protection against murder. Dr. Oppenheimer's principle, however, goes far to clear up a subject on which we have lately had a superfluity of words with a deficiency of thought—that of "fitting the punishment to the crime." If punishment is only admissible as a means to an end, its fitness cannot be separated from its conduciveness to that end: and on Dr. Oppenheimer's principle, the punishment which fits any crime best is the most lenient punishment that will afford adequate protection to the public against that crime. Fitting the crime to the punishment, however, has in practice a somewhat different meaning which also

possesses a considerable element of truth, viz.: We ought to keep our punishments in accordance with public opinion —they should be what the public will regard as fitted to the crime. Dr. Oppenheimer (and others) have elsewhere pointed out the evils which result from passing severe sentences which are not in accordance with public opinion. There is a general wish that the criminal should escape altogether, rather than undergo an excessive punishment. Information and evidence are kept back. Jurors are unwilling to convict; and pressure, often successful, is brought to bear on the person who has the power of remission. The chances of escape become greater in a degree quite capable of balancing the greater severity of the punishment which will be inflicted in cases where there is no escape. The severity which was meant to deter, fails to deter on account of its uncertainty, and the severe punishment proves no better deterrent than a milder one. But I am anticipating. In fact, however, when a Government becomes as democratic as that of this country now is, the punishments to be inflicted will in the long run be determined by public opinion, and the task of the Penologist is to try to keep public opinion right—to keep it in accordance with the public welfare.

There is much historical research in the pages of Dr. Oppenheimer and also in those of Professor Tarde. These discussions will be found interesting, but their value may be easily over-rated. The history of the Criminal law, if studied impartially, may indicate the safe course to be followed, and also the shoals and rocks to be avoided, but it is better to examine it in the light of the true theory than to try to deduce the true theory from it. Some of Dr. Oppenheimer's historical results, however, and his reasons for arriving at them are worthy of notice. "It is not true," he writes, "that in the beginning there was but one law in which the germs of civil and criminal jurisprudence lay undifferentiated. Civil and punitive justice are not therefore

comparable to a double trunk growing from the same root. They arise from independent sources and resemble two rivers which run in parallel beds, the one at certain points of its course sending tributaries to the other. Revenge is the source not of punishment but of rights to redress wrong enforceable by civil action—to damages in kind or in money —of private not of criminal jurisdiction. When Courts first interfere in quarrels between subject and subject, they merely decide whether a tort has been committed for which the plaintiff is entitled to exact revenge or pecuniary compensation. In the case of certain wrongs, liability to the aggrieved individual is later supplanted by, but not transformed into, punishment" (page 171). "The acts first punished as crimes were such as imperilled, or were believed to imperil, the safety of the community. . . . . Fear has been the root-feeling in the genesis of the Criminal law. Destruction of the offender, possibly with all that is his, and expulsion from the commonwealth, are the oldest forms of punishment, the end with which it is inflicted being in either case the elimination from society of him who is a danger to it as long as he remains in its midst" (page 172). Our ancestors did not, in the normal state of things, hate the criminal and give him pain in order to express our hatred of him. They sought to get rid of him, and any pain that they gave him was with a view to this object. It was like stamping out a cattle disease by slaughtering the infected animals. Retaliation, revenge, anger, indignation, restitution, compensation, and similar matters which are often represented as forming the very basis of the Criminal law, belong on this view to the Civil law. The function of the State is to see that the injured man is awarded what he is entitled to and no more. Its attitude is an impartial one, "Nothing extenuate or aught set down in malice."

But in the *Rationale of Punishment* the philosophic view is of course more important than the historic. Starting with

the principle that our general object is the protection of the public, there is more than one way in which we may make punishment (and imprisonment as the kind of punishment most in vogue) subservient to this end. Dr. Oppenheimer enumerates four, viz., Determent, Reformation, Disablement, and "the theory of prevention, or Feuerbach's theory." The last of these approaches closely to the first, but it seems of sufficient importance to merit a separate consideration. The ordinary theory of determent is that we punish a man who has stolen a horse (for example) not in order to give him pain for what he has done without any ulterior object, but because the pain which he suffers will deter both him and others from stealing horses in future—the others being the most important item. But Feuerbach goes back a step farther to the making of the law which forbids the act under a penalty. Let us suppose horses to be introduced for the first time into this country by an autocrat. It occurs to him that without some considerable check on horse-stealing these valuable animals will be frequently stolen, and he accordingly makes a law rendering horse-stealing punishable by death. Here it is uncertain whether anyone will ever break the law and incur the penalty. The autocrat, so far from wishing it, wishes the contrary. His law will be most successful if no occasion arises for putting the death penalty in force. But supposing that a man does violate the law and incurs the penalty, what is the autocrat to do? He has stated that he will punish the offender with death, and this threat has hitherto prevented any violation of the law. But if he lets this man go unpunished, what becomes of his threat for the future? Will anyone abstain from stealing horses on account of the threat when the penalty was remitted in the very first case that arose? According to this view the deterrent element is not the actual punishment but the penalty—the threat of punishment—and the punishment is inflicted in order to

preserve the deterrent efficacy of this threat. A law that may be disobeyed with impunity soon ceases to be a law.

The four theories here discussed are not mutually exclusive. The question is rather which of them should be chiefly attended to. If we hang a man we disable him from doing further mischief, but the death penalty is a very strong deterrent to persons who are considering whether they will commit a certain crime or not. And if we examine the other modes of disablement we shall find that almost all of them include something of a deterrent character. Again, though determent has usually been the great object of imprisonment in this country it always involves temporary disablement. The public is protected against the prisoner's depredations during the time that he remains in prison, which often embraces a considerable portion of his life. This remark is not true of punishment generally. If we flogged the prisoner and then liberated him, there would be no disablement and we would have to depend on determent only. Determent has the advantage over disablement that it protects the public against other people besides the convict. This is not true of simple disablement; but ordinary disablement includes an element of deterrence. Even if the idea of Asylum Prisons (which seems to be involved in the Prevention of Crimes Act 1908) had been carried into effect, life in an Asylum Prison would, to many people, have been a deterrent—a punishment. The Bill as passed, however, contains more determent than disablement. The head reformation is more difficult to deal with. The preliminary question here is: Does imprisonment—or more generally, does punishment—promote the reformation of the offender? Dr. Oppenheimer is not so distinct as usual in dealing with this question. We should be disposed to answer No, and to say that any good results—or bad results—which seemed to have been caused by the punishment of the offender were really due to other causes, chiefly to

the influences brought to bear on the prisoner while he was undergoing punishment. Crime in this relation has often been compared to a disease (why not to an accident ?) and reformation to a cure. Can we expect to cure all manner of diseases by the same treatment, or to succeed in our curative system without taking into consideration all the peculiarities of the patient and the stage of the disease which he has reached ? We must treat patients individually if we seek to reform them, and it would be almost impossible to adopt individual treatment in person without giving rise to charges of partiality and favouritism. And as in the case of diseases, however good our treatment may be, we cannot always rely on effecting a cure. If we attempt to combine deterrence with reformation we must bear in mind that a good part of the duties of the prison officials must consist of making matters more or less unpleasant for the inmates. Are the men who are engaged in this occupation likely to prove successful reformers—the same warder, for instance, flogging a prisoner one day and trying moral suasion on him the next ? Admit reformative agencies freely to the prison while the prisoner is being punished, but do not employ the same man to punish him and to reform him. If, however, there is any kind of imprisonment which has a special tendency to reform a man we should adopt it wherever that can be conveniently done; and if different modes produce the best effects on different men we should endeavour, as far as possible, to subject each man to the kind of imprisonment that will suit him best. But I doubt if any hard and fast rules can be laid down. We shall have to trust largely to the wisdom and benevolence of officials who should of course be chosen with care.

That determent, whether in the ordinary form or that of Feuerbach, should be chiefly attended to appears to be the result of this discussion. But what if we fail to deter the

criminal from repeating his crime and he comes back again and again in spite of our punishments? In the first place, as already mentioned, his punishment may deter others though it has failed to deter himself. In the next place, society has derived considerable protection from his disabling imprisonments, and in the third place, even as regards himself, the failure to deter may not be complete. Take the case of a released prisoner who meditates the commission of a crime. There are reasons for and reasons against, which will differ in almost every individual case even when the meditated crime is the same. In some instances, even if there were no legal penalty, the prisoner would not repeat the offence. In others it would require a very severe legal penalty to prevent him from doing so. But even the strongest legal penalty will not prevent him from committing the crime if he expects to escape the penalty. Dr. Oppenheimer puts this into an algebraic formula,[1] $d = c.s.$, $d$ representing the strength of a deterrent which is just sufficient to overbalance the motives for committing the offence, $s$ the severity of the punishment attached to it by law and $c$ the chance of this punishment being inflicted. Now, as $c$ may be very small (at least, in the opinion of the would-be criminal) it is idle to expect that we can find any punishment sufficiently severe to render $c.s.$ in all cases at least equal to $d$ (and $d$ will itself be greater or smaller according to what the man expects to gain if successful). Numbers of people speak and write as if nothing but the punishment was to be considered and when this punishment did not put an end to the crime it had proved useless as a deterrent. "The certainty of punishment," says Paley, "is of more consequence than its severity." How could the greatest flogger that ever sat on the Bench put down a crime by the cat if the criminals

[1] Let $d$ be the motive (or balance of motives) which would impel the man to do the act if there were no penalty, $s$ being the penalty and $c$ the chance of incurring it if the act is done. What is required is that $c.s.$ should be greater than $d$. No value of $s$ will insure this if $c$ be very small.

were not convicted? But there is probably not a pickpocket or habitual thief who has not sometimes been deterred from committing an offence by the punishments which the present law attaches to it. He reflects that if he were now to steal —with a policeman perhaps standing close by—his chance of escaping detection and conviction would be very small. Every punishment deters more or less, but there is no punishment which will always, and under all circumstances, suffice to prevent any sane man from committing the crime to which it is attached by law. "The man in the street" is sometimes as unreasonable in his demands in this respect as the greatest faddist. A prisoner is declared to be irreclaimable because, after being two or three times punished for stealing, he stole again on being released. It is here assumed that reformation is the natural consequence of punishment, and that as this man has not been reformed by it he is incapable of being reformed. Probably the kind of punishment to which he has been subjected has had the contrary effect. The "hardened ruffian" has sometimes been hardened by the harsh treatment meted out to him. Perhaps it was the prevalence of this notion that punishment promoted reformation that led to reformatory efforts being so completely discarded in English prisons as was the case till quite recently. Almost all visitors to prisons noticed the entire absence of any effort to reform the prisoners. Mr. Tighe Hopkins, who deals with this branch of the subject more fully than Dr. Oppenheimer, cites a curious argument of Sir E. Du Cane on the reformative effect of solitary confinement (p. 46), and a directly contrary opinion from the same book (p. 28). Sir Edmond was not the only writer on the subject who, in borrowing opinions from persons who were regarded as authorities, failed to make them fit each other. "Evil communications corrupt good manners," says St. Paul, but he does not attribute any positive benefit to the mere stoppage of evil communications

much less to the stoppage of all communications whether good or evil. And it is much more easy to stop good communications than bad ones in the case of prisoners. That there have at all times been a few prisoners who were better men when they left than when they entered prison may be admitted; but all writers on the subject seem to be agreed that as a general rule the prisoners deteriorated while in prison and were worse when they left than when they entered. And this general impression—that a man who has once been imprisoned can never be trusted—has done much to prevent criminals from reforming. Nobody is willing to employ the released gaol-bird, and having no means of support except his earnings, he is practically compelled to resume a career of crime. And the system of espionage over released prisoners, which seems to be gaining ground, renders it increasingly difficult for a discharged prisoner to earn an honest livelihood.

A good deal has, however, been recently done to prevent our prisons from becoming nurseries or training-schools for criminals. The Prisons Commissioners believe that under our present system the prisoner will on the average be no worse (if no better) on leaving than on entering, and Sir Robert Anderson seems to be of the same opinion. Neither Mr. Hopkins nor Dr. Oppenheimer adopt this view; but their information may not be quite up to date. We should wish to hear something more on the subject from a careful non-official inquirer. That there has been a marked improvement seems certain, and we have every expectation that it will go on. The Commissioners, we ought to mention, complain that the short sentences which Judges now so frequently pass do not allow sufficient time for the reformative effects of the present system to appear. If a man usually becomes worse while in prison, short sentences are preferable on more than one ground, but if this has ceased to be the case the Commissioners may have grounds

for their complaint. Where a prisoner has contracted bad habits, a short course of training may fail merely in consequence of its shortness. But are there not many of these short-sentence prisoners who need not be imprisoned at all? They are practically imprisoned because they cannot pay a fine—a near approach to imprisonment for debt. Why not leave the Crown to collect the fines by other means than imprisonment, at least until the accumulated fines amounted to a certain sum? Longer sentences for trivial crimes than those now passed are opposed to the spirit of the age. It will generally be found better to get rid of short sentences than to lengthen them.

Prison labour is a matter closely connected with prison reform. Formerly the prisoner was mainly required to do work as a punishment. He was set to some disagreeable kind of labour merely because it was disagreeable, and it was considered no objection that this labour was wholly unremunerative. But as the public has to pay for the prisoner's maintenance, it is evidently for the good of the public that his labour should be as remunerative as possible, and, moreover, by doing useful work in prison he may have a better chance of earning his bread on being released. The problem, however, of making the prisoner's labour pay for his own maintenance—for all that the public has expended on him—is one that has never been solved: and the idea of making the thief pay the man whom he has defrauded out of the surplus proceeds of his prison-labour is simply chimerical. The victim, no doubt, has a right of restitution or compensation, but it is not a debt payable in priority to all other debts, nor even if it were so would he be justified in calling on the State to collect this debt for him by keeping the debtor in prison until it was paid. In some cases a wrongful act is a crime as well as a tort, and may therefore be made the subject of a criminal as well as a civil action, but it does not follow

that the payment of damages as assessed in the civil action should be treated as a punishment for the crime or that imprisonment for the crime should be regarded as payment of the damages. And not only is there no ground for payment of such damages in priority to other debts, but, as Sir Robert Anderson admits, the loss is often due to negligence and want of consideration on the part of the victim.

The Borstal System seems to be a decided advance in rendering our prisons better suited for promoting the reformation of certain classes of prisoners. Mr. Hopkins, who has seen it at work, gives a very favourable report, and the fact that youths who misconduct themselves are sent away from the Borstal Institution will no doubt render it easier for the youths who were not sent away to find employment on their release. The Asylum Prisons can hardly be said to have been tried, but a system based on two inconsistent principles is hardly likely to succeed. There is in the first place a sentence of ordinary penal servitude, and then a further sentence of detention in an Asylum Prison, which is stated to be for the protection of the public. I assume from this statement that the previous term of penal servitude is not for the protection of the public. What then is it for? If for determent, why follow it with a period of preventive detention which assumes that the prisoner will not have been deterred by undergoing his term of penal servitude, and that it will be still necessary to keep him under lock and key to protect the public? It appears to be purely vindictive—to proceed on an erroneous principle which the law does not elsewhere sanction. The original idea seems to have been to provide for the perpetual disablement of irreclaimable criminals without treating them with undue severity. To give effect to this principle, the preliminary term of penal servitude should be struck out. But when ordinary penal servitude for a term of years, followed by imprisonment for life under

milder conditions startled the public, the life-term was cut down and the Hospital for Incurables turned into a kind of Convalescent Home. We were to seek to reform the men who in the original Bill were regarded as irreclaimable.

We commend the works of both Dr. Oppenheimer and Mr. Tighe Hopkins to our readers. But, however the reformatory training in our prisons may be improved, it would be much better to prevent the people who now form our prison population from coming there, than to cure them of their faults after they have come. Education in its widest sense appears to be the best preventive, but in this sense it includes the moral training of the child and preventing him from being exposed to strong temptations. Improvement in this direction is not within the sphere of the Criminal law, but our present arrangements as regards child-criminals under the age of 16 years, are by no means perfect. The trials of boys, in particular, if we may judge from brief newspaper reports, are by no means good specimens of English justice; and there seem to be objections on principle to committing child criminals to institutions that are not completely under the control of the public.[1] Much progress, however, has been made of late years in this country, and there is every reason to hope that it will continue. The interest which the public feels in the subject of Crime and the Criminal law is increasing every year, and increased public interest usually results in an improvement both in the law and in its administration.

LEX.

[1] In a late Irish case, the judge sentenced a boy to detention in a Reformatory, where the heads of the Institution refused to admit him. The judge had to vary his sentence.

## II.—FREEDOM OF CONTRACT.

(*Continued from page 293.*)

WE have seen that the principle of contract and the enforcement of contractual right, at first limited to a few special cases, received a substantial addition in the Middle Ages by the development of the laws of tort, and by the extension of the Common-law remedies for tort largely borrowed from equity. We have seen how that in a large class of cases breach of contract was regarded as being merely of the nature of a tort, because the breach of contract involved an element of deceit; and so first malfeasance, then misfeasance, and lastly non-feasance become actionable at Common law: the first (*viz.*, action for malfeasance) was necessarily for tort merely; the second (*viz.*, action for misfeasance) marks the transition from tort to contract; the last (*viz.*, action for non-feasance) implies the full recognition by the Courts of purely contractual right, even when the contract was wholly executory and the performance by either party as yet untouched.

We have seen that as the law of contract developed in such a way as to give the most ordinary contract an independent existence apart from the facts with which it was concerned, so at the same time there grew up with it the doctrine of consideration requiring some lawful *causa* or motive, or *quid pro quo*, to support the promise which is sought to be enforced, except in the case of the old formal (specialty) contracts.

Moreover, it would not be true to say that the form of a specialty contract imports consideration; on the contrary, the strictly formal contracts were very much older than the doctrine of consideration, and solemnity of form in a contract is one of the marks of archaic systems of

jurisprudence. We have seen that this doctrine of consideration is highly composite in its nature, even when no longer confused with the doctrine of moral obligation set up by Lord Mansfield towards the end of the eighteenth century. We have seen that from the Middle Ages down to the present time there have been two currents of thought with regard to this doctrine of consideration: we have the artificial rule of the Common law that there must be present or future consideration to support a promise, and to the rule against past consideration the equally artificial exception (as it might seem from the Common-law point of view) in favour of past consideration which was at the request of the promisor; but there is also the principle of the Canon law which regards the *causa* or consideration for a promise as merely evidence of the existence of the agreement. We have seen that this more logical view, though repudiated in its cruder and more extreme forms alike by Lord Bacon and by the more modern judges, has been upheld from time to time, not only by Lord Mansfield, but also to a lesser extent, though none the less distinctly, in the most recent cases on the subject. To this extent at least the evidentiary view of consideration is upheld by all the modern authorities on the subject, that "the fact of a past service raises an implication that at the time it was rendered it was to be paid for." Not only is this reasoning generally accepted, but it is seriously doubted whether the few exceptions in favour of past consideration can be supported on any other basis.

It is important to estimate rightly the true position of consideration in contract. Now, as it seems to the present writer, consideration is not inherently essential to contract: it may be incorporated in the contract as part of it, or something collateral to it; it may be a term of the actual performance of the contract, or a condition precedent to it: but in no case can any amount of considerations, or cause,

or motive, or *quid pro quo*, of themselves constitute a contract: in no case can the mere fact of work done constitute an obligation to pay for it. What does constitute a contract is the promise of one party and the agreement of both: the consideration is rather of the nature of a buttress to support the agreement. And this is perfectly consistent even with an artificial rule that there must be consideration: it is not only consistent with, but implied as a matter of course by the evidentiary view of consideration, which view modern writers and judges have found it necessary to adopt from time to time.

So much for the positive side of the scope and extent of this freedom of contract; since the positive requirements for a contract are so few, and since the validity of a contract is the rule and its invalidity the exception, the rule will perhaps best be illustrated by the exceptions; and once the general freedom of contract is borne in mind, the precise extent of it will be marked out by observing the restraints on it. In so doing, we pass by such things as infancy, lunacy, personal incapacity generally, mistake, fraud, misrepresentation, destruction of subject-matter; all these things strike at the very root of contract by subtracting one of the few essential elements from the very meaning of the word. There can be no agreement in the mind of a person who does not know what he is agreeing to, nor if the person has no mind at all.

We are not here concerned with failure to enforce a contract from want of evidence, even if the rule of evidence be statutory as by the Statute of Frauds; nor with the barring of contractual remedies by the Statutes of Limitation; these things belong rather to the adjective law of contract, viz.: the rules of evidence and procedure. The *causa* or consideration however is not so easily excluded from the substantive law of contract: and with it we have already dealt.

What we are here concerned with are agreements complete indeed in the few positive essentials of contract, but vitiated by some positive flaw which brings them into collision with some rule of the Civil or Criminal law, or with some Common-law rule of public policy, or a particular statute directed to the same end (viz., public policy) against contracts of a certain nature. These illegal or void contracts may be divided into four classes:—(1) Contracts absolutely illegal, viz., agreements for committing or furthering a crime or civil injury; (2) Immoral contracts, viz., agreements made with a view to sexual immorality, or prejudicial to the status of marriage; (3) Contracts declared at Common law to be contrary to public policy; (4) Contracts made void by statute with a view to public policy. Before proceeding with the classification, it may be remarked that the word "contract" in the above connection must be used *cum grano salis*; an agreement which cannot by any chance be enforced is really no contract at all. It is also obvious that the above divisions must considerably overlap: and that (3) viz., "contracts contrary to public policy" must really include the whole lot; of course, crimes and civil injuries are contrary to public policy. But the term "contracts contrary to public policy" must be taken to mean that residuum of void contracts which are neither criminal nor immoral, nor yet legislated against by statute, but which the judges on grounds of public policy refuse to allow the Courts to be used for enforcing, because the evil of enforcing such agreements would be even greater than the unmistakeable evil of allowing an agreement to be violated without remedy. To this we shall return later.

Division (1) calls for little comment. It is obvious that the law will not lend itself to the enforcement of an agreement to commit a crime or civil injury: to bring the Civil into direct collision with the Criminal law or into collision with another branch of the Civil law would be anarchical,

The *locus classicus* on the subject is *Allen* v. *Rescons*,[1] in which a contract to beat a man was held illegal and void. So in *Poplett* v. *Stockdale*[2] it was held that the promised payment for printing a libel could not be claimed.

It matters not whether the agreement itself constitutes a criminal conspiracy, whether the cause or consideration or any part of it be illegal, or whether the agreement were indirectly concerned with promoting an illegal object. The tendency is rather to make the rule more strict: *ex turpi causa non oritur actio*.[3] But if the illegal object is as yet wholly intact, and no part of it is carried out, there is held to be still a *locus pœnitentiæ*, so that the party who has paid the price (not being *in pari delicto*) can recover it back.[4] So also, if the illegal object is known only to the defendant, the parties not being *in pari delicto*, the plaintiff is entitled to sue,[5] though it is not always easy to say whether in contract or in tort. But it must not be supposed that the Court will undertake to weigh precisely the measure of moral guilt to see which of the two parties is the worse. If any part of an illegal purpose is carried out, the usual rule prevails, viz., *in pari delicto potior est conditio defendentis*.[6]

Division (2) also requires little comment. The authorities are not very exhaustive, but as far as they go, the rules about immoral contracts are practically the same as the rules about criminal contracts. But as might be expected, even the general rule against immoral contracts is of much later date. Although it seems to have been implied in some earlier decisions, yet it was not until 1866 in *Pearce* v. *Brooks*[7] that it was expressly decided that a contract having an immoral object was void. In this case the

1 [1687], 2 Lev. 174. 2 [1825], 1 Ryan & Moody 337.

3 *Scott* v. *Brown* [1892], 2 Q. B. 724.

4 *Taylor* v. *Bowers* [1876], 1 Q. B. D., C. A. 300, and *Barclay* v. *Pearson* [1893], 2 Ch. 154. 5 *Reynell* v. *Sprye* [1852], 1 D. M. & G. 660.

6 *Kearley* v. *Thompson* [1890], 24 Q. B. D. 742. 7 L. R., 1 Ex. 213.

plaintiff failed to recover the hire of a brougham, because to his knowledge the defendant was a prostitute and required the brougham in the course of her immoral trade. It had already been held in 1853[1] that contracts prejudicial to the status of marriage are void: in this case a marriage settlement contained a proviso which contemplated the separation of husband and wife, and the proviso was held void. In *Wilson* v. *Carnley*[2] a promise by a married man to marry after his wife's death was first upheld in the King's Bench, but the decision was reversed and the promise held void by the Court of Appeal on the ground that such a contract involved disloyalty to an existing marriage; and Farwell, L.J., held it to be actually immoral.

There are still a few points to clear up. It is obvious that a criminal or immoral contract will not be helped by being under seal. But what if the promise is under seal (and itself lawful), and the consideration something criminal or immoral but a thing of the past? Of course past consideration is no consideration; but if the past consideration were a crime, would that be sufficient to vitiate an otherwise valid contract? There is to our knowledge no case on record in which it has been decided whether a past criminal consideration will vitiate an otherwise valid contract.

In *Gray* v. *Matthias*[3] a bond for £700 given in respect of past illicit cohabitation was held valid on the ground that past consideration is no consideration, and therefore the bond, being otherwise valid and not requiring any consideration to support it, must be upheld. And because the bond was valid, the Court refused to order it to be delivered up: at the same time the Court also refused to order another bond to be delivered up, because the second bond, which provided for future illicit cohabitation, was invalid.

[1] *Cartwright* v. *Cartwright*, 3 D. M. & G. 989.

[2] [1908], 1 K. B., C. A. 729.

[3] [1800], 5 Vesey 286.

In neither case was an action brought on the bond: the Court merely refused to order either bond to be delivered up. As regards the second bond (viz., in respect of future immorality), the decision pointed in the direction of *Pearce* v. *Brooks*. But in the opinion of the present writer, the decision in *Gray* v. *Matthias* as regards the first bond (viz., in respect of past immorality), is *pro tanto* no longer to be regarded as sound law. The decision in *Ayerst* v. *Jenkins*,[1] which is sometimes quoted in support of it, was really decided on quite different grounds. There are three points to be urged: (1) The case of *Gray* v. *Matthias* (1800) was decided at the very time when Lord Mansfield's untenable theories of moral obligation were in vogue; and the Court may have considered that the man was under an existing moral obligation to make some definite provision for the woman with whom he had cohabited: but here it may be remarked that whatever Lord Mansfield may have meant by the word "moral," it must not be supposed to be the antithesis of "immoral" in the sense of *Pearce* v. *Brooks*. (2) The case of *Gray* v. *Matthias* was 66 years before *Pearce* v. *Brooks*, and though one of the decisions in the former case may have pointed towards the conclusion arrived at in the latter, yet that conclusion can scarcely have been settled law at the earlier date. (3) The decision in *Gray* v. *Matthias* must be considered as *pro tanto* over-ruled by the *dictum* of Bowen, L.J., in *Stewart* v. *Casey*:[2] "Now the fact of a past service raises an implication that at the time it was rendered it was to be paid for; and, if it was a service which was to be paid for, when you get in the subsequent document a promise to pay, that promise may be treated either as an admission which evidences, or as a positive bargain which fixes the amount of that reasonable remuneration, on the faith of which the service was originally rendered." In other words, the past consideration and the

[1] [1873], 16 Eq. 275.

[2] [1891], 1 Ch. 115.

subsequent promise should, if possible, be regarded as one and the same transaction.

In *Stewart* v. *Casey* the past consideration was a respectable one; but if the past consideration were something criminal or immoral, then presumably so much the worse for the whole transaction.

Division (3), viz., contracts contrary to public policy, is the most extensive and indefinite. It is merely a miscellaneous residuum of contracts which cannot be avoided on any other grounds, and yet which the Courts, on grounds of public policy merely, will refuse to lend themselves to enforcing. It were difficult to subdivide them without the subdivisions overlapping each other, and even overlapping the other divisions. They include contracts prejudicial to the State as amongst other nations, contracts likely to interfere with good government and the administration of justice, contracts to prevent persons from serving in the Army or Navy, contracts prejudicial to family life, and contracts operating unduly in restraint of trade. This part of the law of contract, viz., the invalidity of contracts contrary to public policy, must necessarily consist of Case law; for whenever a contract is made void or illegal by statute, it is thereby transferred to some other division, *e.g.*, gaming and wagering contracts are now void by statute and not for public policy merely.

In *Mitchel* v. *Reynolds*[1] a contract in restraint of trade in a particular parish was upheld; but there was an *obiter dictum* that if the restraint was to be general throughout the kingdom, it would be void as being of no benefit to either party but only oppressive: subsequent decisions on contracts in restraint of trade have apparently altered or at least developed the rule, to which we shall revert later.

In *Collins* v. *Blantern*[2] a bond given to stifle a prosecution for perjury was held void: there is no law against the

[1] [1711], 1 Sm. L. C. 391. [2] [1767], 1 Sm. L. C. 364.

abandonment of a prosecution; but the bond was held "void by the Common law . . . . for the public good." But if the injured party may have either a civil or a criminal remedy, such an agreement is not invalid;[1] unless the offence is one of public concern, in which case it must not be compromised.[2]

In *Lowe* v. *Peers*[3] a contract in restraint of marriage was held illegal and void: it mattered not that the contract was by deed, and consequently required no consideration to support it: there *was* consideration which was contrary to public policy, and that spoilt it.

In *De Costa* v. *Jones*[4] a wager that Monsieur Le Chevalier d'Eon was a female was held an unlawful contract, as contrary to public policy, because it tended to produce indecent evidence and to affect the interest of a third party.

In *Atherfold* v. *Beard*[5] a bet on the hop duty was held unlawful, as tending to expose the amount of the public revenue.

In *Gilbert* v. *Sykes*[6] a bet on the life of Napoleon was held unlawful, on the ground that it gave the one party an interest in the life of the king's enemy, and the other an interest in his assassination.

These three last cases were decided previous to the Gaming Acts; such contracts are now void by statute.

In *Card* v. *Hope*[7] a contract by deed, which bargained for the appointment of a certain person as officer of a ship, was held void as contrary to public policy, because the public ought to have a better test of a man's capacity for such a post than the fact of him or his friends having the means to pay for it.

In *De Wutz* v. *Hendricks*,[8] a contract for raising a loan for aiding the Greeks in their war against Turkey was held void;

[1] *Fisher & Co.* v. *Apollinaris Co.* [1875], L. R., 10 Ch. 297.
[2] *Windhill Local Board* v. *Vint* [1890], 45 Ch. D., C. A. 351.
[3] [1768], 4 Burrows 2225. [4] [1778], Cowp. 729. [5] [1788], 2 T. R. 610.
[6] [1818], 16 East 150. [7] [1824], 2 B. & C. 661. [8] [1824], 2 Bing. 316.

for such a thing might tend to entangle England in a war with which as yet she had no concern.

In *Wells* v. *Foster*,[1] the assignment of a civil service pension was held void, because the pension had been granted not exclusively for past services but also with a view to future services: if the pension had been exclusively for past services it might have been validly assigned; but as the pension had been granted with a view to possible future services, it would not be to the public interest that he should be deprived of it.

In *Mallan* v. *May*,[2] the contract was one in partial restraint of trade: the defendant had been articled to a surgeon-dentist for four years, and had covenanted not to practise as a surgeon-dentist in London, *or at any place in England or Scotland where his master practised during the four years*: it was held that the general object of the agreement was reasonable, viz., that the defendant should learn dentistry; that the covenant not to practise in London was valid; that the more general restraint was invalid, but severable from the valid part of the agreement: therefore the restraint was held enforceable so far only as it was valid.

*Pilkington* v. *Scott*[3] was another case which involved the question of an alleged restraint of trade. The action was in tort: it was brought by a crown-glass manufacturer against another master for wrongfully harbouring the plaintiff's servant. It was alleged that the original contract was in restraint of trade and not supported by adequate consideration, because the servant had agreed to serve plaintiff for seven years and yet be liable himself to a month's notice. But it was held that the restraint was reasonable; and that there was consideration, into the adequacy of which the Court need not inquire.

The case of *Egerton* v. *Earl Brownlow*[4] was not strictly a case of contract, but of a will. It was held, however, that

[1] [1841], 8 M. & W. 151.
[2] [1843], 13 M. & W. 517.
[3] [1846], 15 M. & W. 657.
[4] [1853], 4 H. L. C. 1.

any transaction which has for its object the obtaining of titles and dignities by corrupt means and peerages otherwise than for merit, is *pro tanto* contrary to public policy and void.

In *Exposito* v. *Bowden*[1] an addition was made to the principle of *De Wutz* v. *Hendricks* (1824): not only is a contract illegal the object of which is to aid and abet hostilities on either side in a foreign war in which England has no concern; but whenever England is engaged in war, even peaceful trading (however innocent in itself) at an enemy's port is illegal for a British subject without special licence from his government, so that a contract with a view to such trading is void.

The most important case of a contract in restraint of trade is *Maxim-Nordenfeldt Gun Co.* v. *Nordenfeldt*.[2] The defendant had covenanted to abstain for 25 years from acting in *any* business likely to compete with any such business as the Company might carry on: this was held void. But the defendant had also covenanted to abstain for 25 years from acting in any business as manufacturer of guns, gun-carriages, gunpowder, and ammunition; this was held to be severable from the other covenant, and as for valuable consideration, *viz.*, £287,500, the post of managing director at £2,000 salary and commission on profits—fair, just, and reasonable.

It had been thought since *Mallan* v. *May* (1843), that a restraint on trade should not be unlimited as to space; but between 1843 and 1894 there was such vast improvement in the means of locomotion as to make space of much less importance. So it was accordingly held in *Maxim-Nordenfeldt Gun Co.* v. *Nordenfeldt* (C. A., affirmed by H. L.), that the covenant not to pursue certain specified trades *anywhere* for 25 years was (under the circumstances) reasonable between the parties; and that it was not detrimental to the public interest, because it was to secure

[1] [1857], 7 E. & B. 763. [2] L. R. [1893], 1 Ch. 630., and [1894], A. C. 535.

to an English company the inventions and business of a foreigner, and so encouraged rather than restricted trade in this country. But the decision stopped short of enforcing a covenant not to engage in any business liable to compete with the company; for this was held unreasonable, unnecessary, and void. Agreements have also been held void as tending to interfere with the rights and duties of parentage. Thus in *Humphrys* v. *Polak*,[1] it was held that an agreement whereby the mother of an illegitimate child agreed to assign all her rights to the custody of the child, and to be relieved of maintaining it,—was void: as regards custody of children generally, the Court is still allowed a certain discretionary power under the Custody of Infants Act 1873.[2]

In *Hermann* v. *Charlesworth*,[3] it was held by the Court of Appeal (reversing the decision in King's Bench) that a contract to procure marriage for a money payment was a marriage brocage contract and void, and that as the object had not been carried out the plaintiff was entitled to recover back money paid: it made no difference whether the contract related to a particular person or to a whole class of persons; the essence of the mischief was that such contracts were against public interest.

Another question of public policy was decided in *Beard* v. *Hall*.[4]

It was not a case of contract but of a will; and it was held that any condition directed against entering the naval or military services was void: as in this particular case the condition was of the nature of a forfeiture, the bequest was held absolute. The condition was held void on grounds of public policy, and the same limitation on the freedom of bequest would presumably apply also to freedom of contract.

1 L. R. [1901], 2 K. B. 385.
2 36 & 37 Vict., c. 12.
3 L. R. [1905], 2 K. B. 123.
4 L. R. [1908], 1 Ch. 383.

But all these restrictions on freedom of contract must be taken as subordinate to a more general rule of public policy. It is only when the evil of enforcing a particular species of contract would be greater than the evil of interfering with freedom of contract that the Courts will refuse on grounds of public policy to enforce it. In *Printing and Numerical Co.* v. *Sampson*[1] the Court rejected the plea that a covenant to assign future patents was contrary to public policy as tending to discourage new inventions. "If there is one thing which more than another public policy requires (*per* Jessel, M.R.), it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by Courts of justice. Therefore you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract."

R. L. MARSHALL.

*(To be continued.)*

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## III.—BETROTHALS AND MARRIAGES IN GERMANY.

A BETROTHAL in Germany is a very important matter. When a couple become betrothed it is customary for the parties to exchange rings, and during the time of betrothal for the woman to wear the ring on the third finger of the left hand and the man to do likewise. After marriage the woman places the same ring on the third finger of the right hand, and the man does the same, as in Germany all married men wear wedding rings.

[1] [1875], L. R., 19 Eq. 465.

Whether a betrothal is in the nature of a contract or simply a promise by one party to marry the other is not at all clear, and the most eminent legal writers differ upon this point. The better opinion seems, however, to be that a betrothal is a contract by which two persons of opposite sexes promise to marry each other.

In Germany there is no breach of promise of marriage action as in England, as it is distinctly provided by the German Civil Code that no action can be brought to enforce specific performance of the marriage, and a promise by either party to the other to pay a certain sum as damages in case he or she does not enter into the marriage is a nullity.

In case, however, either party refuses to enter into the marriage, then he or she has to pay the other and to their respective parents, or to such persons as have stood in the place of parents, such damages as they have sustained by reason of having, in expectation of the marriage, incurred expense or entered into engagements in anticipation thereof. Further, the party in default has to compensate the other for any loss he or she has sustained in his or her property, or in his or her position, by anything he or she has done in anticipation of the marriage. The damage to be paid is only to be such as is reasonable under the circumstances of the case. Compensation need not however be paid if there was a good reason for either party refusing to marry the other. Should, for example, the intended bride give up a situation or refuse to accept one, then she is entitled to claim compensation for the loss she has sustained. Further, should one of the betrothed parties, through a wrongful act committed by him or her be the cause of the other withdrawing from the betrothal, then the party who is in fault must compensate the other in manner as hereinbefore mentioned. A woman who is of blameless character and has permitted the man to whom she is betrothed to have carnal

knowledge of her can, if the man withdraws from the betrothal or causes her withdrawal as hereinbefore mentioned, claim from him monetary damages. The claim to damages cannot be assigned and does not pass to the heirs unless the same is admitted by agreement, or an action has been commenced in respect thereof. It is not necessary that the woman should be *enceinte* in order that she may substantiate her claim, neither does it make any difference to her claim, should she have been the means of causing the man to seduce her.

In case no marriage takes place between the betrothed parties, each has the right to demand from the other, according to the provisions relating to the return of things or benefits acquired by a person who thereby unjustifiably enriches himself, the return of the presents given to him or her, or as a pledge of the betrothal. In cases of doubt, it is to be considered that the return of presents cannot be required if the betrothal has been put an end to by the death of one of the parties. Presents made before the betrothal need not be returned, neither need letters sent by the parties to each other, as they are not considered as presents. The claim, as hereinbefore mentioned, which either party to the betrothal has against each other is barred within two years after the determination of the betrothal.

As to marriages, it may be observed that a man cannot marry until he has attained full age, *i.e.*, the age of twenty-one years, and a woman the age of sixteen years; but a man can be declared by the Guardianship Court of full age when he is eighteen years old, and a woman can obtain a dispensation permitting her to marry before she has attained the age of sixteen years.

If a person is limited in disposing capacity, it is essential for him before he can contract a marriage to obtain the consent of his legal representative. Should the legal representative of such a person be his or her guardian, and refuse

to give his consent, then the necessary consent may, on application by the person refused, be supplied or given by the Guardianship Court. The Guardianship Court must give its consent to the marriage if the same is for the applicant's benefit, and it is in the Court's discretion whether it will grant the application or not. A legitimate child until he or she has attained the age of twenty-one years requires the consent of the father, an illegitimate child until it has attained a similar age, requires the consent of its mother to marry. In case the father is dead, or in case he loses his paternal right according to paragraph 1701 of the German Civil Code, then the consent of the mother suffices. Paragraph 1701 provides that in case the father knew that the marriage was void at the time it was entered into, then he forfeits his paternal rights and the paternal authority or power is vested in the mother. A child who has been declared legitimate does not in case of the father's death require the consent of the mother to marry. In cases where the father or mother are permanently unable to give the necessary declaration, or where it is absolutely impossible to obtain their addresses, then it is to be considered that they are dead. A marriage entered into without the necessary consent being first had and obtained is neither void nor voidable.

With respect to a child who has been adopted, the right to consent to the marriage of such a child is given to those who have adopted the child. Should a married couple jointly have adopted the child, or should one of the married persons have adopted the child of the other, then the law applicable as hereinbefore mentioned with respect to a legitimate child, with the exception of that portion which refers to a child declared to be legitimate, is applicable. Should the legal relationship which has arisen by adoption be determined, the natural parents do not again acquire their right of consent.

The consent required to be given by the parent cannot be given by his representative or agent. In case the father or mother is limited in disposing capacity, the consent of the legal representative or agent is not necessary. Thus, in case the person whose consent is required is only temporarily limited in disposing capacity, then the marriage of the infant could not take place until he attained the age of twenty-one, as the person who could give his consent is incapable of so doing, and his legal representative is likewise in a similar position.

Should the parent of a child of full age refuse his consent to the latter's marriage, then the Guardianship Court may on application by the infant supply such consent, and must do so if the consent has been refused without good cause or reason. The Court should, before it gives its decision, and provided there will be no great delay and no heavy costs will be incurred, hear the relations both by blood and marriage. As a matter of fact, it is only in such cases where a person has been declared of full age before he or she has attained twenty-one, that the aforesaid application is necessary.

No person is allowed to marry before his previous marriage has been dissolved or declared a nullity. A marriage is dissolved by the death of one of the parties, by the remarriage of the husband or wife of a person who has been declared dead, or by divorce. Should persons who are already married, desire to re-marry, *e.g.*, by reason of there being some doubt as to the validity of the first marriage; there is no necessity that the marriage already entered into between the parties should be declared a nullity. Where an action is commenced for a declaration of nullity or of restitution against a judgment which has dissolved a marriage or declared the same as being a nullity, the parties thereto cannot contract another marriage until the suit so commenced as aforesaid is determined,

unless the action has not been commenced until after the prescribed period of five years.

No marriage can be entered into between parties who are related by blood in the direct line, nor between brothers and sisters of full blood or half blood, nor between those who are related by marriage in the direct line. A marriage is void if entered into between relatives by blood or by marriage, contrary to the aforesaid provisions. Neither can persons, the one of whom has had illicit intercourse with parents, grandparents, or the descendants of the other, contract a marriage. If, however, such a marriage is entered into, the sa ne is not a nullity, neither can proceedings be taken to set it aside. Relationship by blood within the meaning of the aforesaid provisions, exists between an illegitimate child and its descendants on the one side, and the father and his relations by blood on the other side, and this, though it is provided by the German Civil Code that no relationship exists between an illegitimate child and its father.

A person who has adopted another, cannot marry the person adopted or his or her descendants, so long as the legal relationship arising out of the adoption continues. Should persons who stand in the aforesaid relationship to each other contract a marriage, this does not effect the validity of the same, the only result is that the legal obligation which arose by the adoption comes to an end.

Further, a marriage cannot be entered into between a divorced person and the person with whom the divorced party has committed adultery, if it is stated in the judgment that the adultery has been the ground of the divorce. A dispensation can however be granted by the proper authority, releasing the divorced person from the aforesaid provision. Should a marriage be contracted without obtaining the necessary dispensation, such marriage is void; but if after the marriage a dispensation is obtained, then

such marriage is to be considered as valid from the commencement, *i.e.*, from the time the parties were married. Such dispensation however, must be obtained before such a marriage has been dissolved or declared a nullity.

A woman cannot marry again until ten months from the dissolution of her marriage, *i.e.*, where the marriage has been determined by the death of her husband, or by divorce, or ten months from the time when the marriage has been declared a nullity, unless in the meantime she had given birth to a child. A dispensation, however, may be obtained by her, releasing her from these provisions. A person who has a legitimate child, which child is not of full age, or of which he is guardian, can only contract a marriage after the Guardianship Court has granted him a certificate that he has fulfilled the provisions of paragraph 1669 of the German Civil Code, or that he is released therefrom. Paragraph 1669 of the Code enacts, that in case the father is desirous of marrying again, then he must notify the Guardianship Court of such his intention, and at his own costs lodge with the Court an account or particulars of the property committed to his administration, and in so far as there is a community of the property between him and the child, he must arrange to settle matters. The Guardianship Court is, however, empowered to grant a settlement of the matter to take place after the marriage of the father. In the case of a continued community of goods where a participating descendant is not of full age or is under guardianship, the surviving spouse can only marry, after the Guardianship Court has granted him or her a certificate that he or she has fulfilled the obligations imposed upon him or her by paragraph 1493, sect. 2, of the German Civil Code, or that he or she is released from such obligations. Sect. 2 of the said paragraph enacts, that should the surviving spouse intend to re-marry, and a participating descendant is not of full age, or is under guardianship, then he or she must

notify the Guardianship Court of such intention, and lodge an account or particulars of the common property with the Court, dissolve the community of goods, and arrange to settle the matter. The Guardianship Court can order that the dissolution of the community of goods need not take place till the marriage is entered into, and postpone the time for settling matters.

Persons who are in military service, or in the service of the State, and who require permission to marry, cannot marry before obtaining such permission. Foreigners who, according to the State laws, require permission, or a certificate to marry, cannot marry before they have obtained such permission or certificate.

As to the form of marriage it may be observed that, before a marriage can be entered into, there must be what is called an "*Aufgebot*," which literally translated means "publication," but in an extended sense signifies all those preliminary proceedings which parties desirous of marrying must take in order to enable them to marry and which precede the marriage, thus: the parties must appear before the competent official or Registrar (*Standesbeamter*) and produce to him their baptismal and birth certificates, furnish him with particulars as to where they reside, occupation (if any), the names of their respective parents, etc.; upon which their names—after other minor formalities have taken place—are written on a list, and which list is hung outside of the Town Hall of the district in which the parties reside, and within a period of three weeks after the parties have given the aforesaid notice of their intention to marry, the marriage may be entered into. In case the marriage is not concluded within a period of six months after the notice or publication, then the notice becomes ineffective. Should one of the betrothed parties be so seriously ill as not to permit of a postponement of the marriage, then in such a case the notice or publication may be dispensed with.

A dispensation may also be obtained from the proper authority rendering it unnecessary to make the publication.

The marriage is entered into by the parties appearing personally before the Registrar and respectively declaring in each other's presence that they intend to marry each other. This official must be prepared to accept the declaration. Such declaration must not be a conditional one or be made subject to any time limitation. The Registrar must, in the presence of two witnesses, ask the respective parties intending to be married, each separately and one after the other, if they are desirous to marry each other, and after the parties have answered the question in the affirmative, then the Registrar states that, according to law they are legally married persons. Those persons who have been deprived of civil rights cannot during the period of deprivation act as witnesses, neither can such persons who are not of full age, but those who are related by blood or by marriage to one of the betrothed parties or to the Registrar may act as witnesses. The Registrar must make an entry of the marriage in the marriage register. The omission of the Registrar to ask the necessary questions or the declaration by him that the parties are married, the fact that two witnesses are not present, or that the witnesses were incompetent, does not affect the validity of the marriage.

The marriage should be entered into before a duly authorised Registrar. A competent Registrar is such an one in whose district one of the betrothed parties has his or her domicile or residence. If neither of the betrothed parties has his usual domicile or place of residence within the Empire, and if one of the parties is a German, then the highest authority of the State to which the party who is a German belongs, and which has the control of these matters, names the Registrar, and if the party belongs to no State, then the Imperial Chancellor designates him. If there are several Registrars who are competent to perform

the marriage ceremony, the parties to the intended marriage can designate which one they please. Further, it is permitted to a Registrar of the proper district to give a written authority to the Registrar of another district to perform the marriage ceremony.

The marriage is in every case a civil one, but the parties, if they so desire, can have it followed by a religious ceremony.

HENRY HAPPOLD.

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## IV.—THE PROTECTION OF PRODIGALS.

ONE of the problems of a complex civilization is whether spendthrifts should not, at the instance of their families, be protected from the consequences of their eccentricities. Prodigals were protected by the Roman law from the earliest times, a law of the twelve tables providing that madmen and prodigals, although of full age, should be under curation of their next-of-kin (*agnati*), or if they had no *agnati* or such only as were unqualified, then their curators duly appointed. The civil codes of most Latin or quasi-Latin countries, such as France, Belgium, Holland, Italy, and Spain, contain provisions for the protection of prodigals based on those of the Roman law, and Germany, Russia, and Japan, in preparing their latest civil codes, have borrowed the principle, and, to a certain extent, the practice in this particular from the Code Napoleon. The similar enactments in force in Lower Canada and the Union of South Africa are due to the respective influences of French and Roman-Dutch law on the legal systems of these countries. The British Islands and the United States of America are practically the only important countries in which no protection is afforded to unfortunate persons possessed with a mania for spending money without reference to their means, such immunity being due doubtless to the exceptional regard

entertained by the Common law of England for the liberty of the subject. A similar feeling has retarded the growth of the movement for the recognition of drunkenness as a form of disease and the protection of dipsomaniacs, and it is only within the last twenty years that, by the passing of the Vexatious Actions Act 1896, the Courts have been empowered to restrain another class of eccentric spendthrift —the habitual litigant.

It would appear, however, from the judgments of the Court of Appeal and the speeches in the House of Lords in the case of the Marquess of Ailesbury's Settled Estates,[1] that the tendency of modern legislation, as exemplified on that occasion by the Settled Land Acts, is to subordinate the wishes and feelings of an individual family to the well-being of an entire neighbourhood, and it is not a far cry from that decision, the effect of which would have been to transfer an estate from an impoverished landowner to a wealthy magnate to the material advantage of a rural population, to some such system as obtains in Continental countries for the transfer of the property of an irresponsible prodigal to his duly constituted trustee.

In certain cases where reckless prodigality is combined with mental incapacity, senility or decay caused by excesses, overwork or other similar causes, although the patient's condition does not demand the restraint of his person, his property may, under sect. 116 (1) (d) of the Lunacy Act 1890, be protected by the appointment by the Master in Lunacy of a person to exercise certain of the powers of a committee of his estate, and in such a case no reference to lunacy appears in any of the documents in the matter. There are, however, obviously many cases of prodigality which do not come within the purview of this section which virtually requires actual demonstrable disease as well as incapacity in the management of affairs.

[1] L. R. [1892], 1 Ch. 506: [1892], App. Cas. p. 356.

It has been suggested that the justification for the provisions on this subject to be found in Continental civil codes is the limitation placed on the disposing capacity of testators by the laws of these countries, under which a man's relations may be said to have a kind of statutory reversionary interest in his property, but a careful survey of the subject tends to rebut this presumption, the French civil code, for instance, expressly providing that the property of a protected person shall be utilised for the benefit of that person, and that the family council to be called to consider the question of placing a person under protection shall consist of people who, under ordinary circumstances, would not inherit any interest in the estate of that person.

In the civil codes of most Continental countries prodigality is treated under the same heading that provides for the "interdiction" of insane persons from exercising the legal privileges of ordinary citizens, but a careful distinction is drawn between the irresponsible and the reckless, the French civil code providing that prodigals so found by a family council may be forbidden by the Court to bring actions, effect compromises, borrow, give valid receipts, or alienate or mortgage property without the assistance of an adviser to be appointed by the Court. The German civil code, however, regards the prodigal with less tenderness, classing him with lunatics, habitual drunkards, and feeble-minded persons, but in this code also a clear distinction is drawn between insanity and prodigality, contracts entered into by persons interdicted on account of insanity being void, whereas contracts entered into by persons interdicted on account of prodigality are voidable only, and can be subsequently ratified by the lawfully constituted adviser to the prodigal.

In France the procedure for the appointment of an adviser to a prodigal is for an application to be made *ex parte* to the Court of First Instance by any of his blood relations

who have obtained the fiat of the procureur, when, if a case for investigation is made out, the judge will direct a family council to be convened, and on receiving their report confirming the allegations of prodigality the Court will examine the defendant in Chambers, and if the charge is substantiated, will adjourn the matter into Court where the interdiction will be pronounced, not an absolute interdiction as in the case of insane persons but a limited interdiction coupled with the appointment of an adviser. In urgent cases an interim interdiction can be obtained in Chambers.

It is submitted that somewhat similar provisions for the protection of prodigals might with advantage be introduced into our own legal system without violation of any of the cardinal principles of English law. That there are numerous cases in which an injury is inflicted, not only upon an individual family but upon an entire neighbourhood, by the reckless and wasteful prodigality of an otherwise normal individual will be admitted by most legal practitioners, for every quarter of London has its once opulent eccentric who has ruined himself and his family by indulgence in his peculiar crank, and every countryside boasts a Folly in the erection of which a fortune has been wasted. It should be pointed out moreover to the supporters of the threadbare doctrine that luxury and wastefulness deserve encouragement in that they are good for trade, that the adoption of a system for the protection of prodigals would still leave ample scope for much extravagance and capriciousness, for in ordinary cases the income of the prodigal's estate would still be available to him for the gratification of his every whim and fancy, the effect of the proposed reform not being to prevent the man with ten thousand a-year from "pouring his income down a drain," but to prevent the man with but ten thousand pounds, who has already squandered nine thousand in some such manner, from dealing likewise with the rest of his fortune, and becoming dependent for the rest

of life on the bounty of his relations. Under present conditions it not infrequently happens that a prodigal is protected from himself by being made bankrupt by the rest of his family, either in respect of moneys which they have advanced to him, or as the assignees of ordinary creditors whose rights they have acquired by purchase, but such a subterfuge does not merit encouragement, for apart from the stigma of bankruptcy and the loss of civil and social amenities it entails, the creditors are not infrequently placed at a disadvantage by the reduction of the dividend, owing to the admission of claims on the part of relatives, which although perfectly in order would not under ordinary circumstances have been pressed. Another method at present adopted is for a testator or settlor to insert in a will or settlement a "prodigal" clause, by which the property is given to the beneficiary for life or any less period, or until he shall do or suffer any act, matter or thing whereby the property becomes vested in any other person, the trust premises in that event going over to the other members of the beneficiary's family or to strangers. Such a clause serves a useful purpose where the beneficiary has already given indications of prodigal tendencies, but where it is inserted indiscriminately it frequently acts as an unreasonable clog on the freedom of action of a rational and prudent person.

It is suggested that the proposed reform might be conveniently carried out by the passing of a short statute rendering the provisions of paragraph (D) of sub-sect. 1 of sect. 116 of the Lunacy Act 1890 applicable to persons who (to borrow the definition contained in the German civil code) "by prodigality expose themselves or their families to the danger of want." As we have already pointed out, in proceedings under this particular section every precaution is taken that parties whose property is being administered shall not be subject to the stigma of lunacy, their cases being

intituled, "In the matter of the Acts 53 Vict. cap. 5 and 54 & 55 Vict. cap. 65 and 8 Edw. VII cap. 47," the Master in Lunacy having cognisance thereof being designated "one of the Masters referred to in the above-mentioned Acts," with a special seal so describing him for use on these occasions. At the same time, to bring the matter under this jurisdiction would ensure cheapness of procedure, there being no filing fees or charges for certificates of fund, etc., in the Lunacy Office, and secrecy, affidavits used and orders made in this department not being placed on the public file available for inspection by the curious.

In addition to the customary undertaking by the receiver to be appointed in the matter and the affidavit as to his fitness, the affidavit of kindred and the affidavit proving service of summons required under this section, in prodigal cases an affidavit or affidavits would have to be filed in support of the application showing the necessity therefor, the extent and nature of the prodigal's property, and citing numerous specific acts of prodigality in connection therewith. Should the respondent file a notice of objection to the appointment of the receiver, either on the ground that he was not a fit and proper person to be appointed, or that the allegations contained in the applicant's affidavit are untrue or do not justify the making of an Order for a receiver, such objection would be heard in the first instance by the Master in Chambers on the return of the summons, from whose decision either party would have a right of appeal to the Lords Justices exercising jurisdiction under the Acts with an ultimate appeal to the House of Lords. The Order appointing the receiver would direct the proper parties to lodge in Court the title deeds of all landed property possessed by the prodigal, and all moneys and securities for money belonging to him, and provide that the income therefrom (after payment of costs and discharge of outstanding liabilities) should be paid out to the prodigal by equal quarterly or

half-yearly instalments, subject to the usual evidence of life. Leave to vary and transpose the investments would be obtainable by the receiver on application to the Court from time to time.

It is submitted that some such enactment as is outlined above would remove a grave defect from our present legal system, which is practically unique in affording no protection to a type of character which is bound to be represented at no infrequent intervals among families who inherit riches and a taste for the pleasures of rich men.

HUGH RENDELL.

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## V.—THE FRENCH JUDICIAL SYSTEM.

### PART II.—CRIMINAL.

THE criminal courts in France are the Tribunal de Simple Police, Tribunal Correctionnel, Cour d'Assises, Cour de Cassation and Haute Cour de Justice. The Tribunal de Simple Police has jurisdiction over petty offences not involving over fifteen francs fine or five days' imprisonment. The Tribunal Correctionnel is the chamber of the Tribunal de Premiere Instance set aside and exclusively devoted to the hearing of misdemeanours and appeals from the Tribunal de Simple Police, its original jurisdiction involving offences punishable by over fifteen francs fine and over five days' imprisonment. The Cour d'Assises has jurisdiction over crimes triable by a jury—felonies—where the prisoner has been indicted. The Criminal Chamber of the Cour de Cassation is an appellate tribunal. Finally there is the Haute Cour de Justice, or High Court of Justice, which is a rare and exceptional tribunal of criminal jurisdiction. It is composed of the Senate convened by decree of the President

of the Republic as a High Court of Justice. The President selects a magistrate from the members of the Cour de Cassation or Cour d'Appel, who is charged with the duties of an attorney-general before the Court, and one or more magistrates to assist him. It is an instance of a legislative body being transformed into a judicial body, and in some respects it resembles a court of impeachment, as it is empowered to try the President of the Republic and the Ministers for crimes committed in the exercise of their functions. But its jurisdiction is not limited in this respect, as the Senate, on being convened as a High Court of Justice by decree, is empowered to try those accused of attempts against the safety of the State, which is practically high treason. Ordinarily these offences, especially when they do not assume an important political character, are disposed of by the ordinary tribunals, the Senate only being convened as a High Court of Justice under extraordinary circumstances; as, for instance, when it tried General Boulanger.

One of the fundamental distinctions in French criminal procedure is the separation between the preliminary investigation and proof of an offence and its prosecution. The first is a matter that rests almost entirely with the Juge d'Instruction, who is in no way a prosecuting officer, and who possesses no authority to do more than to collect, obtain and prepare in judicial form the evidence of a crime. Once the evidence has been completed, the prosecution of the accused rests entirely with the administrative part of the Government, that is to say, the public prosecutor, or procureur de la république. While keeping this distinction in mind, it is refreshing to see with what ease and facility these two officials, following distinct and separate lines of work, yet labour in entire accord and sympathy. The Juge d'Instruction is absolute master in the preparation of the evidence and documents relating to the affair, in the same

way that the public prosecutor—once the matter has passed into his hands—assumes sole and absolute control thereof.

What is known as the judicial police (police judiciare) forms an important feature of the French Criminal Judicial System. The authority of some of these officers resembles in many respects that of ordinary police or committing magistrates, and yet they possess far greater power and independence in so far as the securing of evidence, the reconstitution of a crime, the preparation of the case, and the prosecution of the charge against the accused is concerned. The judicial police include the commissaires de police, officers of gendarmerie, mayors and their deputies, prosecuting officers, justices of the peace and Juges d'Instruction. The latter form by far the most important of these officials. On the shoulders of the Juge d'Instruction is really thrown the brunt and labour of the administration of the criminal law. His functions and duty are unique. There is at least one for every arrondissement appointed for three years by the President of the Republic from among those holding the title of judge or from among the assistant or deputy judges. On the commission of a crime the Juge d'Instruction, either on his own initiative or on that of the prosecuting officer, hastens to the scene and makes a personal examination, using all the ability and astuteness of a skilled detective in bringing to light the details of the affair; and in this way some of the Juges d'Instruction have become famous owing to their cleverness and adroitness in bringing to justice those guilty of the most abominable but apparently unfathomable crimes. The Juge d'Instruction works, however, in strict harmony with the public prosecutor, who usually accompanies him in constating a crime; and among his arbitrary powers is the right to go to the habitation or office of the accused (or elsewhere if necessary) and seize any papers, books or documents, or other evidence material to the charge against him and place them under seals and

remove them. When an accused is brought before a Juge d'Instruction the latter becomes for all intents and purposes a committing magistrate. He proceeds from time to time with the examination of the accused and other witnesses whose evidence is reduced to writing; he has power in certain cases to admit to bail, and when his investigation is complete he either discharges the accused or sends him for trial before the tribunal having cognizance of the offence.

One of the most singular yet effective features of the French Criminal Judicial System is what is known as the "partie civile." A claim for compensation caused by a felony, misdemeanour or simple police offence, can be heard and determined at the same time by the same tribunal and by the same procedure as the criminal charge. The person injured constitutes himself what is known as "partie civile," and has the right of being heard and represented by counsel, and awarded damages without the delay and expense of resorting to an independent separate action. The civil remedy, although connected with, is in no way dependent upon the criminal proceeding; the two can be prosecuted together but need not be, as this is optional with the person injured or partie civile.

French criminal law is divided into:—

(A) Contraventions or police offences.

(B) Délits or misdemeanours.

(C) Crimes or felonies.

We will consider these in their consecutive order.

(A) Contraventions or police offences are punishable by imprisonment for not less than one day or more than five, and a fine of from one to fifteen francs, and the confiscation of the objects or material seized.

(B) Délits or misdemeanours are punishable by imprisonment for not less than six days nor more than five years,

and where specially authorized by law, the Court may deprive the offender from exercising civic, civil, or family rights; from voting or being eligible to election; from serving as a juror or other public function; from carrying arms; from participating in the family conseil and various other privileges; by a fine and, where a party has joined in the proceedings as a partie civile, by restitution or damages.

(c) The penalty for crimes or felonies is corporal and degrading punishment, or only degrading punishment. Corporal and degrading punishments are death; penal servitude for life or years; deportation; imprisonment with hard labour, and loss of civil rights and imprisonment.

The death penalty (excepting military crimes) is carried out by decapitation, executions by means of the guillotine having officially existed since the decree of March 20th, 1792.

All offenders triable by a jury must be sent before the assizes on an acte d'accusation or written charge, which is drawn up by the public prosecutor, and must contain the nature of the offence which forms the basis of the charge, and facts and any circumstances which may add to or reduce the penalty. The accused must be named and clearly identified. The acte d'accusation, or written charge, takes the place of an indictment in Anglo-Saxon criminal jurisprudence, and it only follows an ârret de renvoi or judgment sending the offender before a court for trial, which order is pronounced by what is known as *la Chambre des mise en accusation*, or chamber of accusation. This chamber is composed of a section of the Cour d'Appel specially formed for this purpose, which convenes on the order of its president at the request of the public prosecutor whenever necessary to hear the report of that magistrate and pass upon his application; and in the

absence of a request by the public prosecutor the chamber meets once a week. The chamber passes upon the case immediately after hearing the report of the public prosecutor; if this is impossible, then it must render its decision not later than within three days. The judges composing the chamber ascertain whether there exists against the accused the proof or the indications of a fact designated as a crime by law, and if these proofs or indications are sufficiently serious to justify the pronouncing of an act of accusation. The clerk reads to the judge in the presence of the public prosecutor all the documents in the case, after which they are left on the table, together with any memorandum the partie civile or the accused may have furnished; but neither the partie civile, the accused, nor witnesses are present. The public prosecutor having deposited his application in writing, and signed by him, on the table, he and the clerk withdraw. Then the judges at once deliberate among themselves, and without communicating with anybody the Court, by one and the same judgment, passes on the various connected offences (*délits connexes*) which they find among the documents produced before them. And here we come to one of the most interesting, and at the same time to the stranger the most bewildering feature of the French Criminal Judicial System, as was so well brought out on the recent trial of the automobile bandits.

Offences are connected either when they have been committed at the same time by several persons together, or when they have been committed by different persons or at different times and places, but pursuant to an understanding formed beforehand among them, either when those guilty have committed one in order to procure the means with which to commit the other, to facilitate it, to carry out its execution, or to assure its being unpunished. A striking illustration of this, as I have already mentioned,

was the trial of the automobile bandits. In March last twenty accused were arraigned before the Cour d'Assises and a jury, several of whom were accused of murders punishable with death, but not of the same person or at the same place; some of whom were accused of crimes punishable by imprisonment for life: some for twenty years, and some for offences only punishable by imprisonment for ten years. Yet all the long list of offences were so connected and so inextricably woven together that they formed one continued narration of crime; and it is a credit to any system of criminal procedure that enables the final hearing and disposal of such a series of crimes at one and the same time. Every one of the prisoners had a fair and impartial trial, and each offence was carefully and separately decided, the evidence relating to the participation of each prisoner being distinctly limited to his case; and while to a stranger this intermixing of different and separate crimes—calling for various degrees of punishment—may appear to be an unfair and unequal measure of justice, it is not so. Four of the accused were found guilty of murder and condemned to death, while four were acquitted, the others being sentenced to various terms of imprisonment ranging from deportation for life to imprisonment for one year, and in no single instance was one of the accused deprived of any right to which a person accused of a crime under Anglo-Saxon methods of criminal procedure is entitled to.

A Cour d'Assises is held in each department to judge those whom the *Chambre des mise en accusation* has sent there. The Cour d'Assises is presided over by a councillor of the Cour d'Appel appointed for this purpose, who is president, and by two other judges taken either from among the councillors of the Cour d'Appel, or from the presidents or councillors of the Tribunal de Première Instance of the place where the assize is held. These courts are held in the principal town of the department every three months, and oftener

if necessary. The president is charged to hear the accused at the time of his arrival in the court house, to summon the jurors and to draw them by lot. In addition, he is charged to personally direct the jury in the exercise of their functions, to expose to them the affair they are to judge, reminding them of their duty, and to preside at all hearings and determine the order in which those entitled to speak shall be heard. The president is also invested with discretionary power in virtue of which he is enabled to do whatever he thinks necessary in order to discover the truth, the law charging him on his honour and conscience to employ all his efforts in favour of its manifestation. He is also empowered during the course of the trial to cause to be produced and hear any witness or other evidence which may be revealed on hearing the accused or the witnesses, and which may appear to him to shed any light on the facts in dispute. If the prisoner has not chosen a lawyer, the Court appoints one to defend him. He appears unmanacled and only accompanied by guards to see he does not escape. The president asks his name, christian name, age. profession, residence, and the place of his birth, and then he cautions his lawyer that he must not say anything against his conscience or in disrespect of the laws, and that he must express himself with decency and moderation. The president rising and uncovered then addresses the jury thus: "You swear and "promise before God and man to examine with the most "scrupulous attention the charge that has been brought "against X; not to betray either the interests of the "accused or those of society which accuses; not to com-"municate with anyone until after your verdict; hearken "not to hate, neither to fear or affection; decide accord-"ing to the charge and the means of defence, according "to your conscience and your personal conviction, with "that impartiality and firmness which becomes an upright "and free man." Immediately afterwards he notifies the

accused to be attentive to what he hears, and directs the clerk to read the order of the *Chambre des mise en accusation* sending the case to the Cour d'Assises as well as the indictment (*acte d'accusation*). After the public prosecutor has explained the charge, the list of witnesses is read by the clerk and the witnesses are required to retire into an adjourning room, precautions being taken if necessary to prevent their conferring together about the charge or the accused before they testify. The witnesses are called consecutively, according to the order established by the public prosecutor, the president first administering an oath to speak without hate or fear, and to say all the truth and nothing but the truth. Then follows the most marked and radical feature of the French criminal judicial system—the interrogation of witnesses by the president. A witness cannot be interrupted, but when he has concluded his testimony, the accused or his lawyer can ask the president to put questions to him; and the president then asks the prisoner if he desires to reply to what the witness has said against him, whereupon he or his lawyer can say whatever may be useful to the defence, either against the witness or his testimony.

The following persons are prohibited from testifying: the father, mother, grand-father, grand-mother, and all other ascendants of the accused or anyone of the accused present and undergoing trial; the son, daughter, grandson, grand-daughter and all other descendants; brothers and sisters, those related in the same degree by marriage (*des alliés aux mêmes degrés*); husband and wife, even after divorce; and informers who, by law, receive a public pecuniary reward. The jurors, the public prosecutor, and the judges can take notes of whatever appears to them important, either in the depositions of witnesses or in the defence of the accused. In every criminal matter, even in the case of an old offender, the president, after having charged the jury regarding the questions raised by the

indictment (*l'acte d'accusation*) and the debates, warns the jury that if a majority of them think that there exist attenuating circumstances in favour of one or more of the accused, although recognized to be guilty, they must make the following declaration: By the majority there are attenuating circumstances in favour of the accused. Then the president hands to the foreman of the jury the questions in writing they are to answer, together with all the documents and papers in the case, and having warned them that each vote must be by secret ballot, the jury retire to their room which they cannot leave until they have decided on their verdict. No one is allowed to go into their room without written permission of the president, and he himself cannot enter unless he is called by the foreman of the jury and is accompanied by the lawyer for the accused, the public prosecutor, and the clerk; and the fact must be recorded in the official proceedings.

A jury is composed of twelve jurors. If the case is apt to continue for a long time or involves questions that will prolong the hearing, the court may order at the time of the empanelling of the jury that one or two additional jurors be selected who act as jurors in reserve; and in the event of a juror becoming ill or otherwise incapacitated he is immediately supplanted by the extra or reserve juryman who has participated in the proceedings and who is thus in every way qualified to act; and in this way mis-trials or the failure of justice never occurs by reason of the original jury being reduced.

Extraordinary means are taken to secure a fair trial so far as the jury is concerned, and to allow absolute independence in the casting of their ballots; in fact, the moment the jury retire into their room their conduct, deliberation and balloting are surrounded by every precaution calculated to insure perfect freedom of action and independence on the part of the individual juryman.

The jury votes by written ballots and by separate and consecutive balloting at first on the principal fact, and if there is reason to do so then on the aggravating circumstances, on legitimate excuse, on the question of discretion, and finally on the question of extenuating circumstances, which the foreman puts to the jury whenever the culpability of the accused has first been determined. To this end each juryman on being called by the foreman is handed an open ballot bearing the stamp of the Cour d'Assises and the words: "On my honour and my conscience my declaration is—" and the juryman himself fills in the blank space or he asks another juryman to do so for him, with the word "yes" or "no" on a table so arranged that no one else can see what is written on the ballot. Having filled in the ballot he folds it and hands it to the foreman who deposits it in an urn or box used expressly for this purpose. Immediately after each ballot the ballots are burnt in the presence of the jury. This system of successive balloting often throws a tremendous burden on a jury, and it is questionable whether under the circumstances an ordinary jury is sufficiently qualified either from experience or intelligence to properly pass upon the vast number of questions submitted to them. In a recent case—what the journals called "les scandales de Nice"—where there was a general acquitment of all the accused, no less than 402 questions were submitted to the jury. All questions are determined by a majority vote and the verdict must say so although the number of votes cast for or against the accused must not be revealed. Having decided on their verdict the jury enter the court room and take their seats, whereupon the president asks them what is the result of their deliberation. The foreman, rising, and placing his hand on his heart, says: "On my honour and my conscience before God and men, the verdict of the jury is—". The verdict is then signed by the foreman and handed to the president in the presence of the jury; and

it is also signed by the president and clerk. If the Court is convinced that while observing the necessary legal formalities the jury have been mistaken on the merits, it can set aside the verdict and send the case to the following sessions. No one has the right to request that this be done, the Court having authority to act solely on its own initiative.

Deportation is essentially a political punishment, or rather a punishment for a political offence, and consists either in what is known as deportation, which means transportation and being restrained for life within a fortified enclosure, or simple deportation—exile to some place prescribed by law beyond the Republic. In either case the condemned must remain where deported to but where otherwise he is practically free.

Detention is also a punishment reserved especially for political offenders, and must be for not less than five or more than twenty years, the offender being confined in one of the fortresses within the Republic determined by Presidential decree.

A curious survival of an ancient custom is still found in the Penal Code—strangely enough article 13—by which a parricide condemned to death is conducted to the place of execution in his shirt-sleeves, bare-footed, and with his head covered with a black veil. Thus attired, he is exposed to the public on the scaffold, while the sheriff reads the sentence, and then immediately executed.

Those condemned to penal servitude are sent to some penal settlements, such, for example, as Guyane or New Caledonia, the old offenders, and confirmed criminals being, as a rule, sent to the former. The prisoners are employed in the hardest labour, dragging at their feet an iron ball, or bound two-and-two by a chain when the nature of the work permits it. No one 60 years of age can be sentenced to penal servitude, such sentence being replaced by imprison-

ment. Convicts condemned to penal servitude for less than eight years are bound after the expiration of their sentence to continue to reside in the Colony for a period equal to that for which they were condemned, while those sentenced for more than eight years must pass the rest of their life there. After a convict has served his sentence he can, on the express authorisation of the governor, temporarily leave the colony, but in no case is he allowed to return to France.

The court can absolve the accused if the fact of which he is declared to be guilty is not forbidden by a penal statute. As already noted, the jury may find the accused excusable, but a felony or misdemeanour is only excusable in a case where and under such circumstances as the law declares it to be so. Thus blows, wounds, and even murder are excusable if provoked by blows or serious violence; and this applies where they occur in the day-time in repelling an individual climbing over or breaking into enclosures, walls or entrances to an inhabited house or apartment or out-buildings. If these occur during the night-time they are regarded as necessarily caused in self defence, and while text-writers have contended otherwise, the Cour de Cassation has adopted the theory that murder even when accompanied by premeditation can be excusable. It is difficult to agree with this reasoning, or find a sufficiently logical basis on which to place two such inconsistent principles.

Parricide, however, is never excusable, and a murder by a husband of a wife or a wife of a husband is not excusable unless the life of the one who commits the murder is in peril at the moment when the crime is committed. This excellent provise can well be appreciated, and is based on sound reasoning, and why it should only apply to matrimonial murders and not to others it is indeed difficult to understand. In the case of matrimonial murders there is an express provision of law providing that where

a husband murders his wife (mark well that it is not in favour of the wife) or her accomplice at the moment they are surprised in the act of adultery in the matrimonial domicile (not elsewhere) it is excusable. But the most wonderful of all these legal excuses is that which provides that the crime of castration, if immediately provoked by a violent outrage against decency, is to be considered as excusable murder or wounding.

But excusable murder and crime does not mean that the guilty person is discharged or undergoes no punishment. When the fact constituting a legal excuse has been proven, if it relates to a crime punishable by death or penal servitude for life or deportation, the penalty is reduced to imprisonment for from one to five years; if it relates to another felony it is reduced to imprisonment from six months to two years, and if it relates to misdemeanour the penalty is reduced to imprisonment for from six days to six months.

The penal law relating to adultery shows the prevailing disposition to favour the husband and restrain the wife; it is a remnant of the old theory of the wife's vassalage and absorption on marriage in the personality of her husband. A wife can only be charged with adultery on the complaint of her husband, and if convicted is liable to from three months to two years' imprisonment; but the husband retains the right to stop the execution of the sentence by taking back his wife. The accomplice is liable to the same term of imprisonment, and in addition to a fine of from 100 to 2,000 francs; but the offence is exceedingly difficult to prove against the accomplice as the law restricts the only proof to evidence that the parties were caught *en flagrant délit* or to such as results from letters or other writing written by the accomplice. What constitutes *flagrant délit* has been the subject of exhaustive discussion. It does not mean that the parties must necessarily be caught in the act of adultery. *Flagrant*

*délit* is ordinarily supposed to mean taken or caught in the commission of a crime, but with regard to adultery this is not so. *Flagrant délit* can be presumed, as when a married woman and her accomplice remain together in a locked room for some time and refuse to open the door.

There is not one law and one graduated scale of punishment for perjury, but the crime is shaded into many nice distinctions, and false testimony in favour or against a criminal is in the eyes of the law an entirely different offence from perjury in a civil suit. It is not easy to comprehend why perjury should be treated more considerately in one case than in another, or why the punishment, once the crime has been committed and proven, should be graded so as to virtually distinguish between the various kinds and degrees of false swearing. Public policy requires one firm, strong, and unvarying rule in such cases. Perjury, wherever and whenever committed, without distinction as to the place or surrounding circumstances, should receive the same punishment. Criminal law, like the Civil law, is getting to be too much of a metaphysical science, tending in its practical results to the evil-doer's escape from just and proper punishment. Under the French Criminal system false swearing in a criminal trial, such as at the assizes either against or in favour of the accused, is punishable by reclusion, which means from five to ten years' imprisonment with hard labour, and where the accused is condemned to a more severe punishment the witness who has deposed falsely against him can be sentenced to the same punishment, while one guilty of giving false evidence in a civil case is punishable by imprisonment for from two to five years and a fine of from fifty to two thousand francs. Another thing requiring notice in connection with the offence of perjury is the ordinary statute of limitations. In France in commercial cases there is no absolute bar to a civil remedy simply by the lapse

of time, but assuming the particular period of limitations has run and is pleaded, then in that case the adversary has the right to put the party setting up the statute on his oath, *i.e.*, has the privilege of insisting that he swear the debt has been paid. Naturally, while a party may be only too ready to plead the statute of limitations, yet when it comes to making oath that the debt has been paid that is quite a different matter, and may well cause him to pause, especially when a false oath under such circumstances subjects the offender to imprisonment from at least one to five years; to a fine of from 100 to 3,000 francs, and in addition may deprive him of certain civic, civil, and family rights at least from ten to five years, during which period he may be placed under the surveillance of the police.

Perjury under the French law is a progressive crime not depending for its punishment on the offence itself, but upon its attendant circumstances and surroundings. The law should, however, look at the act of a perjurer as inimicable to and destructive to the morality, order, and well being of society, and stamp the conduct of those who give false testimony with its condemnation, accepting no excuse and refusing all mitigating circumstances. Without truth the fabric of all civilised authority will tumble in ruins, and social order become riot. Truth is the foundation of all religion; it is the groundwork of our schools and the basis of our education; it is the moral fibre of every great people; it is the guiding star to all success and progress; the one cardinal principle that, inculcated in the hearts and minds of a nation, will enable it to triumph over every adversity with courage and determination. Truth admits of no shading, no qualification, no degree. A thing is either true or it is false, and once let a deliberate false statement be proven, it merits but one condemnation and one punishment. In this particular the French Criminal

Judicial System is wrong, because it is founded on a mistaken idea of a great fundamental principle. As there can be but one right and one wrong, so a thing can only be true or false, and he who seeks to take away or destroy life, liberty or property, by falsehood, should be punished for the crime itself—purely and simply for the wrong done—and irrespective of consequences of the perjured testimony.

A severe, and what might be considered harsh law is that against vagabondage or vagrancy. It may account for the absence to a large extent of the tramp class, for in France, once a vagabond falls into the clutches of the law it is likely to go very hard with him, for the Legislature has left very little discretion with those before whom an individual so unfortunate as to be charged as a vagabond may be brought. Vagabondage is a misdemeanour. Vagabonds and vagrants are those who have neither a fixed domicile or the means of support, and who do not regularly exercise any profession or occupation. Vagabonds and vagrants over sixteen years of age who have legally been declared such, are liable for this fact alone to from three to six months' imprisonment, and after having served their term, they remain under the surveillance of the police for a period of not less than five or more than ten years. An alien declared by a judgment to be a vagabond can be conducted to the frontier by order of the Government and put out of the country.

No account of the French Criminal Judicial System would be complete without referring to the semi-theatrical aspect it sometimes assumes, and which, from long custom and habit, it seems almost impossible to avoid. The reconstitution of a crime is an almost every-day occurrence, and yet, it is terribly dramatic and spectacular—it is re-enacting the tragedy with living persons—frequently with the dead body lying as originally found—and in the presence of and before the eyes of the alleged criminal. Sometimes it is too much

for the nerves even of a hardened desperate murderer, and before this *mise en scène* of his crime he weakens, breaks down, and confesses. Courts have taken occasion, however, not only to criticise, but even condemn, this time-honoured custom, and it is doubtful whether it will long survive modern and more liberal ideas of criminal procedure. Besides the reconstitution of a crime is the dramatic spectacle of confrontation, or bringing an accused person before his victim, or a witness, for the purpose of identification, and as this often occurs when one of the parties is *in extremis*, the scene becomes a theatrical and terrible ordeal.

An amusing as well as tragic scene, illustrating the natural theatrical tendency of those connected with the administration of criminal justice, occurred when the desperado Lacombe, momentarily escaping the vigilance of his warders, scrambled up a wall, and finally, perched like a bird on the ridge of the prison building in temporary security, not only defied all orders to descend, but hurled vile language and invective back at the officials gathered below in the prison yard. Such an escaped prisoner is no more than a wild beast, and under the circumstances, it would not only have been proper, but fitting, that he should have been shot down by the guard in the same way that any criminal seeking to escape should be shot. This, however, was the thing furthest from the mind of the officials who not only did not shoot him down, but on his demand, sent for his lawyer, and then calmly awaited his arrival. When he came the lawyer was assisted to approach his client, the criminal, on his perch on the roof, by means of a ladder, and permitted to have an interview with him. Imagine such an exhibition—what a theatrical picture for a drama. When this scene, which occupied an hour or two, had been played, and the avocat had descended from the ladder, his client proceeded to dash his brains out by plunging headlong into the stone courtyard below!

With all that is admirable in the French Judicial Criminal System there is that one great bulwark of personal liberty lacking that is essential to the liberty of the citizen—the writ of *habeas corpus*. In France this does not exist: in France there is no writ that secures the liberty of the individual from illegal restraint. With few exceptions, no matter how wrong and illegal his arrest may be, the accused when once taken into custody and confined in prison incurs the risk of awaiting the outcome of the investigation that the Jùge d'Instruction makes into the charge, which may be a matter of days or weeks or months according to circumstances; and even if discharged and entirely exonerated from the charge, the accused may have had to linger in a common prison for months without the possibility of seeking release. One sees on every hand the words: "Liberty, Equality, Fraternity," and France is called a Free Republic; but the history of the world has demonstrated that no country can be so called where the sacred writ of *habeas corpus* is unknown. In England and in the United States the writ of *habeas corpus* is now regarded as the greatest and most important remedy known to the law. From the assent of King John at Runnymede (June 15th, 1215), until the famous Habeas Corpus Act of 31 Charles II, c. 2 (1680), followed by the Statute 56 George III, c. 100 (1816), the life and existence of this right passed through many trying vicissitudes only eventually to be saved and secured to future generations by the statutes above referred to.

C. A. HERESHOFF BARTLETT.

## VI.—LORD CHANCELLOR HARDWICKE.

A VALUABLE addition has been made to historical literature by the recent publication of the *Life of Lord Chancellor Hardwicke* by Mr. Philip Yorke.[1] This important work in three volumes sets forth in the light of the most recent historical research the wonderful career of one of the greatest of English Chancellors. It contains a considerable amount of matter hitherto unpublished, which throws fresh light not only on the character and life of Lord Hardwicke himself, but on the inner history of his times. The biographer approaches his subject in a spirit of warm appreciation. Carlyle says, in his essay on Voltaire, that no character can be rightly understood, unless it has first been regarded with a feeling of sympathy, and the biographer of Lord Hardwicke writes of his hero in a spirit of sympathetic admiration. His point of view is strongly Whiggish and anti-Jacobite, but it is impossible to write of the eighteenth century without yielding to what Herbert Spencer called the political bias, and Mr. Philip Yorke's Whiggism is an excusable fault. The biography is extremely interesting reading, and no serious student of Lord Hardwicke's age can afford to neglect it.

Philip Yorke, first Earl of Hardwicke, who was born in 1690, was the son of an attorney in Dover, and the grandson of a well-to-do wine-cooper of Puritan proclivities in the same town. His home was one of the best type, and, as his biographer says, "from the first were instilled in him austerity of morals, untiring industry, perseverance in the face of disappointment and difficulty, calm equanimity of temper, steady and unbending uprightness, clear sense of duty, a strong and simple religious faith, and courageous and firm convictions." After a sound education young Yorke

[1] London: The Cambridge University Press. 1913.

he became Lord Chief Justice and was created a peer with the title of Lord Hardwicke, and finally, in 1737, he became Lord Chancellor, an office which he filled for twenty years with the utmost distinction.

Although Lord Hardwicke played an important part in the politics of his time, it was as a great judge that he desired to be known. His biographer devotes a long and interesting chapter to his work and influence as Chancellor, and gives an account of some of his more important decisions. Before his time the province of Equity had been uncertain and undefined, depending much on the personality of the individual who occupied the woolsack. In the chancellorship of Hardwicke the scope and limit of Equity jurisdiction were gradually mapped out and defined. He laid great stress on the importance of certainty and finality in the administration of Equity. *Misera est servitus ubi jus vagum.* "Certainty," he said, "is the mother of repose, and therefore the law aims at certainty." And again, "Authorities established are so many laws, and receding from them unsettles property, and uncertainty is the unavoidable consequence." Hardwicke was averse to hair-splitting subtleties and distinctions without a difference. He based his decisions on broad divergencies and clear principles. "It would be," he said, "the strangest thing in this world for a Court of Equity to determine upon such nice distinctions and very slight arguments, which would never stand with the reason of mankind without doors." Sometimes he frankly confessed his difficulty in coming to a decision, and appealed to the parties to relieve him. "I foresee," he said in one case, "great hardship on the one side and dangerous consequences on the other, and have very great doubts with myself what decree I shall make; and therefore recommend it to the parties, as it is a case of considerable difficulty, to find out a third way of moderating this affair."

Hardwicke did much to modify the antagonism and antipathy between the Courts of Equity and Common law, which had existed previously to his time. In his chancellorship the two legal systems of Equity and Common law, while retaining their separate Courts, ceased to be rivals and became not antagonistic, but supplementary, working together in harmony and agreement. Although Chancellor and presiding in a Court of Equity for nearly twenty years, he had been Lord Chief Justice, and was himself the greatest authority on the Common law then living. It was natural therefore that he should discountenance any disparagement of the Common law, and should not indulge in unnecessary interference with the Common law jurisdiction.

Hardwicke constantly endeavoured to bring order into

> "That codeless myriad of precedents,
> That wilderness of single instances,"

which made up Equity. He possessed a wonderful power of applying general principles to concrete cases and extracting a legal axiom from individual decisions. He has a great capacity for generalisations, which was partly a natural intellectual gift, and partly the result of his studies in Roman law and his wide reading. Hardwicke brought his generalising and creative faculty to bear on the disconnected and confused collection of cases and precedents which made up English Equity. He educed from each an abstract notion, and from these again drew some rule or fundamental principle, at once covering all former precedents, superseding them, and providing a new foundation upon which subsequent decisions might be based. By the close of his career Equity jurisprudence had become a scientific and harmonious system capable of infinite expansion, and based on the clearest and widest philosophical principles. The chancellorship of Hardwicke was,

as his biographer says, the golden age of Equity, in which it attained its highest development and possessed its greatest exponent.

As a jurist and a judge, Hardwicke obtained the highest praise from the most eminent lawyers. It was said that he fostered his reputation by preventing appeals from his Court to the House of Lords. It was pointed out that no peerages were granted to judges while he was Chancellor, and that he was the only law lord in the upper chamber from his appointment to the woolsack until his resignation in 1756. To appeal from Hardwicke, Chancellor, meant merely to appeal to Hardwicke, peer. Considerable colour is given to the accusation by the elevation of both Ryder and Murray to the peerage at the exact moment of Hardwicke's retirement. His biographer points out that he attempted to mitigate the ineffectiveness of the House of Lords as a final court of appeal by the practice of re-hearing cases, but, as he only reversed his own decrees in two instances, this remedy was not of much value. But even assuming that he manœuvred to prevent his judgments being over-ruled, there is no question of his supremacy as a jurist. Lord Camden said that "one solemn determination by him was worth one hundred *dicta* of any other lawyer." Lord Eldon spoke of him as one of the greatest of all who had ever sat in Westminster Hall. Lord Kenyon described him as a consummate master of the profession. Lord Campbell called him the pattern of all judicial excellence, and praised the indefatigable industry and the unremitting pains, which he took to qualify himself for the discharge of his high duties.

Lord Hardwicke, who was Chancellor from 1737 to 1756, held office during the premierships of Sir Robert Walpole (1721–1742), Lord Wilmington (1742–1743), Henry Pelham (1743–1754), and the Duke of Newcastle (1754–1756). During the premiership of Henry Pelham, and afterwards

during that of Pelham's brother, the Duke of Newcastle, Hardwicke was one of the chief pillars of the Administration. The former Administration was troubled by eternal dissensions between the Prime Minister and his brother, the Duke, and Hardwicke was the man who was always called in to make peace between them. When the Duke himself became first Minister of the Crown, he owed his success in maintaining himself in power very largely to the undeviating loyalty and support of Hardwicke. Their mutual friendship and confidence were maintained intact for half a century through many vicissitudes and dissensions. The Duke, fretful, fearful, lacking in self-reliance and fortitude, reposed with security on the calm judgment and firm resolution of the Chancellor. The great influence which Hardwicke acquired was not due to royal favour, or personal popularity, or parliamentary interest, or brilliant oratory. It was due to his upright character, his great reputation as a judge, his unrivalled tact and knowledge of the world, his untiring patience and good humour in dealing with his Sovereign, his colleagues, and the Opposition.

Hardwicke was particularly successful in his dealings with the King. George the Second was as impatient of restraint and as greedy of personal power as any of the Stuarts, and he had to be carefully and tactfully managed. He was not popular with the nation. He preferred his wretched German electorate to the United Kingdom, and constantly showed his preference. It was reported, for example, that he wore the yellow sash, the Hanoverian badge, at the battle of Dettingen, which gave great offence in England. He had to be protected from the effects of his conduct and, in the interests of the Whig oligarchy, his dynasty had to be kept on the throne. In this work Hardwicke proved exceedingly useful. He was always at hand, with his tact and good humour, to persuade or remonstrate with the troublesome monarch.

A considerable amount of attention is devoted by the biographer of Lord Hardwicke to the Jacobite rising of 1745. Colonel Joseph Yorke, one of Hardwicke's sons, was on the staff of the Duke of Cumberland during the campaign against the Highland troops of Prince Charles Edward, and he sent home to his family a series of letters of very great interest, describing the movements and experiences of the Royal army. At first the Rising was regarded with indifference and contempt, but the remarkable and successful operations of Prince Charles soon changed those feelings into cowardice and alarm. The failure of the English generals to conquer or crush the Jacobite troops excited the bloodthirsty hatred of Colonel Yorke. "I hope soon this unhappy affair will be quite over, and the executioner succeed to us," is a specimen of his ferocious comments. His letters supply a rich variety of abusive terms applied to the Highlanders—"vermin, brood of villains, locusts, infernals, banditti, pitiful louzy knitty rebels, band of vagabonds, pack of cruel dogs." There is much talk in the letters about Cumberland, "the heroic prince," who, Colonel Yorke, with singular lack of foresight, hoped, might live to be "the darling of a free people." The profligacy and worthlessness of the Duke's character had not yet blossomed forth, and the toadyism apparent in Colonel Yorke's letters, as well as in those of his father, is more excusable than it would have been at a later date. One of the letters gives a vivid account of the Battle of Culloden. "To describe the slaughter and confusion of the scoundrels," says Colonel Yorke, "requires a pen as much abler than mine as the arms that dealt death to the rebels were stronger; but so glorious a ruin eye never saw before." After Culloden the Highlanders were crushed with cold-blooded brutality. Lord President Forbes, the chief pillar of the Government in Scotland, tried to mitigate Cumberland's thirst for blood, and he was sneered at by

the Duke as "that old woman who talked to me about humanity." The biographer of Lord Hardwicke endeavours to whitewash the Duke, and to palliate the cruelties after Culloden, in a passage that carries no conviction to the mind of the reader. No re-writing of history can wash the bloodstains from the hands of that royal ruffian. To the end of time he will be known by the name which the Highlanders gave him—"the Butcher."

Hardwicke presided as Lord High Steward at the trials of Lords Kilmarnock, Cromartie, Balmerino, and Lovat, who had been implicated in the Rising. At the trial of Lord Lovat, Hardwicke's behaviour was thoroughly characteristic. While discreetly pressing the charge against the prisoner, he always kept an eye on the peers, and was always ready to draw back when he had gone too far. His pompous manner was mimicked by George Selwyn in a gruesome incident described by Horace Walpole. Selwyn, after watching the undertakers stitching Lovat's head to his body, addressed the corpse, and, imitating the Chancellor's voice, said, "My Lord Lovat, your Lordship may rise." According to the barbarous rule of the time Lord Lovat was not allowed to have the assistance of Counsel in examining or cross-examining as to facts. His Counsel were only allowed to be heard on points of law. The aged and infirm Lovat begged that the rule might be relaxed in his case, but his request was refused, and the rule bore so heavily on him as to create a widespread feeling of disgust. The biographer allows his anti-Jacobite bias to mislead him in speaking of Lovat's experience. He says of Lovat, that "his age and infirmities—for he declared he could neither hear, see, speak, or stand—excited no compassion, and only created sport and amusement for the spectators, when it was seen that they were merely a ruse to obstruct the course of the trial." This is not borne out by contemporary evidence. Horace Walpole, to take

a single instance, said, "It hurt everybody at old Lovat's trial, all guilty as he was, to see an old wretch worried by the first lawyers in England, without any assistance but his own unpractised defence." Immediately after the trial, Sir William Yonge, one of the managers in the case, moved that impeached persons should be allowed the full use of their Counsel as in ordinary Courts.

Space does not permit of going into further detail with regard to the life of Lord Hardwicke, who died in 1763, full of years and honour. His memory has hitherto suffered from the want of an adequate history of his career. In the case of Hardwicke as in that of other Chancellors, Lord Campbell has distorted and misrepresented the man, whom he professed to depict. In the work of Mr. Philip Yorke an adequate and noble tribute to his memory has been provided, and justice has been done to a great luminary of the English Bench. Students of history may well be grateful to Lord Hardwicke's biographer for his masterly work.

J. A. LOVAT-FRASER.

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## VII.—IN MEMORIAM.

### (1) THE RIGHT HON. LORD MACNAGHTEN.

THE writer of this brief memoir feels sure that readers of the *Law Magazine* will recognise the fitness of the presence in its pages of some notice, slight though it be, of the great lawyer whose long and admirable career closed a few months ago. Lord Macnaghten was an acute and learned jurist, a successful advocate in the Courts of Chancery, and afterwards during many years of office in the House of Lords and on the Judicial Committee of the Privy Council, a judge with whom few in his or

in any earlier generation could be compared without disadvantage. But his life deserves consideration on wider grounds. It was in all its stages, from the early manhood at Cambridge onwards, typical of a very excellent sort of practical energy in our human workshop. It has afforded a striking illustration of the worth of the *mens sana in corpore sano*, a result to which the happy combination of the training of the University scholar and the training of the University athlete doubtless in great measure contributed. Macnaghten's was, indeed, no common personality. Force of will and earnestness of purpose underlay a singularly quiet and reserved but always courteous demeanour. There was ambition, but it was an ambition which easily escaped notice through his habitual avoidance of every kind of notoriety and parade. There was industry, but it was so entirely controlled by a sensitive critical faculty that its efforts were directed to the perfection of workmanship rather than to abundance of production; and this led some of his contemporaries at the Bar wrongly to set down to inertness of temperament that which was really due to the deliberation of a careful craftsman who spared no pains to ensure high quality in his work. Robustness was the note of Macnaghten's moral and mental character. He hated iniquity and cant of every sort. A rare quickness of intellect and a keen sense of humour were steadied by a cautious and discriminating judgment. If he had a mental fault, it lay in an excessive distrust of novel methods and theories. The strength of his opinions—and Macnaghten held very strong opinions on some legal and political subjects—never provoked him to undignified or ungenerous speech.

Edward Macnaghten was born in London on the 3rd February 1830, the second son of Sir Edmund Macnaghten. His childhood was spent first in Warwickshire, and afterwards in Ireland at Roe Park, Limavady, co. Derry. At the

age of twelve he was sent to the Grange School, Sunderland. In February 1848 he entered Trinity College, Dublin. His stay there was short, for in the autumn of the same year he migrated to Trinity College, Cambridge; but it was marked by an exciting episode. Ireland in 1848 was in a disturbed state, and Macnaghten and his fellow-students were drilled and armed for the protection of the College. A considerable number did in fact assault it, and for a time only a gate separated the assailants without and the armed students within. Fortunately for all parties concerned, that barrier was sufficiently stout to withstand the onset, until the mob was dispersed by the military authorities.

In 1850, his second year at Trinity College, Cambridge, Macnaghten was elected to a College scholarship, and in 1851 he won a University (the Davies) Scholarship. In 1852 he was bracketed Senior Classic with Burn and Hammond (also Trinity College men) and attained the position of a "senior optime" in the Mathematical Tripos —a very remarkable achievement for an undergraduate who won the Diamond Sculls at Henley and twice, once at Putney and once at Henley, rowed in the Cambridge boat. The first Chancellor's medal was awarded to Benson (afterwards Archbishop) and the second to Macnaghten. In 1853 Macnaghten was elected to a Trinity fellowship, and in the same year he began his study for the Bar under the tuition of Mr. John Wickens, who eighteen years afterwards was appointed a Vice-Chancellor. In 1857 he was called to the Bar, and for the next twenty-three years, in the second of which he married the daughter of Baron Martin, continued to practise as a junior in the Courts of Chancery, and acquired a high reputation for legal knowledge and acumen. The first year was marked by a somewhat amusing episode. As secretary of the Chancery Funds Commission he had to present a report to Lord Chancellor Westbury. The young Counsel,

who had given time and thought to its preparation, expected, or at any rate hoped, that the Lord Chancellor would give him at least a kind word in recognition of his labour. All that he in fact received was a somewhat curt admonition to go and pursue the proper business of his profession.

In 1880 Macnaghten made his entry into political life, being in the April of that year elected junior member for the county of Antrim; and he was thereupon, without any application on his part, offered by Lord Chancellor Cairns the honour of a silk gown. Macnaghten accepted it, and thenceforward, until his elevation to the office of a Lord of Appeal in 1887, he practised with success as a Q.C., first, for a very short time, in the Rolls Court, before Sir George Jessel, M.R., and afterwards in the Court of Mr. Justice Chitty. In 1883 he declined a judgeship offered him by Lord Selborne. In 1885 and again in 1886 he was returned to Parliament as Member for North Antrim. It was characteristic of Macnaghten that during the whole of the time that he was in Parliament he only made three speeches, all of them on Irish topics on which he had special knowledge. He never sought opportunities for display, either in the legal or in the Parliamentary world. But in both men soon learnt to appreciate the worth of his character and the weight of his opinion.

On the formation of a Conservative Government in 1886, Macnaghten was offered the office of Home Secretary, with the prospect in certain events of even further advancement. But he loved his profession too well, and he preferred to remain within its sphere. In the following year, however, the resignation of Lord Blackburn created a vacancy in the supreme tribunal, and Macnaghten was appointed to fill it. It is quite unnecessary for one who is writing in a legal periodical to expatiate at length upon the proved excellence of the appointment. From January 1887, when it was

made, to February 1913, when he died in harness after twenty-six years of judicial work, the Law Reports were year by year enriched by judgments of Lord Macnaghten, which, whether considered in respect of substance, as expositions of law, or in respect of literary merit, rank amongst the most masterly expressions of judicial wisdom. The sure grasp of legal principles, the equally sure grasp in each case of the facts to which the principles had to be applied, the power of shrewd and searching analysis, and the art of diction, at once simple and incisive, all these are there, and, with them, on fitting occasions, the touch of a dry humour, which can lend a charm even to the discussion of the rule in *Shelley's Case*. Lord Macnaghten's speeches in *Trevor* v. *Whitworth*, in *Nordenfelt* v. *The Nordenfelt Ammunition Co.*, and in *Foxwell* v. *Van Grutten* (to name only three out of many), will always be numbered with the classics of legal literature. In the celebrated case of *General Assembly of Free Church of Scotland* v. *Lord Overtoun*, his opinion was not that of the majority of his colleagues; but, for lawyer and layman alike, his speech has made a delightful study out of an intricate ecclesiastical controversy.

Diligently as Lord Macnaghten always attended to his judicial duties, both in the House of Lords and on the Judicial Committee of the Privy Council (where his mastery of Hindu and Mohammedan law rendered his assistance peculiarly valuable), he found time and opportunity during this period of his life to do useful public work in other ways. In 1893 he acted as arbitrator in the Portsea Island Building Society arbitration. In 1899 he undertook the duty of chairman of the arbitral tribunal charged with the settlement of a boundary dispute between Chili and Argentina, on the conclusion of which in 1902 he received from his Sovereign the distinction of the G.C.M.G., to which in 1911 was added the G.C.B. But even more important than those extra-judicial services to which I have

just referred was that which he rendered to the legal world in 1895, when he accepted the chairmanship of the Council of Legal Education. He retained that post till his death, and it is impossible to exaggerate the value of the work for Legal Education which during those eighteen years was accomplished under his guidance, and largely through his personal devotion to the cause. If the system of education provided by the Inns of Court is now upon a sound and satisfactory basis, the credit is largely due to the Council's indefatigable Chairman. No detail was too small for his personal attention. He gave to the business of the Council time and thought without stint. There were some amongst his colleagues on the Council who wished that Lord Macnaghten was less conservative, less distrustful of any scheme which appeared likely to involve organic change; there were none who did not admiringly recognise his sagacity and the quiet devotion which did so much and never tired. On Thursday, the 13th February last, the writer of this paper sat by him at a meeting of the Council. Lord Macnaghten was obviously not well; but he performed his duties with all his old vigour and business-like assiduity. Little did any of his colleagues dream that it was the last Council that their revered Chairman would attend. But only four days later, full of years and of honours, Lord Macnaghten passed peacefully to his rest, leaving us a memorable example—the example of a man, who, in the words of the present Lord Chancellor, was "more than a great lawyer—he was a great judge with a passionate desire to do justice."

W. R. KENNEDY.

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(2) THE RIGHT HON. LORD GORELL OF BRAMPTON.

On April 22nd of this year, Lord Gorell passed away to his Great Assize. Although it was known that he had been for some time feeling the effects of overwork, it was

hoped that, with rest and leisure, he would have lived for many years. At the time of his death he was only sixty-five, and but for the fact that he had never spared himself—gave of his best to those he served—he would probably have still been with us and have had many years left to serve his country and enjoy a mellowed old age.

His death touches the writer of this note very nearly. It was my good fortune to be closely associated with him when he was junior, silk and judge. Called to the Bar in 1876, he took silk in 1888, and in 1892 was raised to the Bench. Upon the death of Sir Francis Jeune in 1905, he was appointed President of the Probate, Divorce and Admiralty Division. In 1909, to the regret of all practitioners in the Division, the learned Judge resigned the position of President and was elevated to the Peerage.

Notwithstanding the fact that before his retirement from the Bench his health had suffered from overwork, it was not in his nature to be idle, and instead of taking advantage of the leisure that he had so well earned he at once took upon himself new and arduous burdens. He acted as arbitrator in several important labour disputes, presided over a Departmental Committee on Prize law, the County Court Procedure Committee, the Divorce Commission, was a member of the Stage Plays Committee, and whenever time and opportunity allowed, which unhappily was rare, sat in the Appellate Tribunals of the House of Lords and Privy Council. Before his retirement he sat in and on occasions presided over the Court of Appeal, and, although his work as advocate had been mainly connected with ships and shipping matters, he showed a grasp and knowledge of all principles of law which won the admiration of his colleagues and the Bar.

Lord Gorell was without the gifts and tricks of eloquence, but in a high degree possessed lucidity of thought and expression: he was able to make clear to others what was

clear to himself. Setting for himself a high standard of thoroughness and efficiency, he insisted so far as he could upon those who worked with him doing likewise.

If I may be permitted to strike a personal note, I—and I am sure it is so with many other Admiralty Court practitioners—owe him a deep debt of gratitude for the benefit that we derived from working with him when at the Bar, and before him when on the Bench. He exacted brevity, accuracy and thoroughness. His judgments are models of what judgments should be, and will live for all time as a guide to the litigant and the jurist. Both as advocate and judge his method was, first, to determine the principle applicable to the question in dispute, and then to ascertain the true state of the facts. He abhorred fringe, and strongly held the view that nearly all disputes turned on one, or at the most two points. He will always hold a foremost place among the judges of our country.

Notwithstanding his love of his profession, he was a keen sportsman, and here as in his work, whatever his hand found to do, he did with all his might. Of his domestic life it would not be fitting that I should speak beyond saying this, that he was a kind and devoted husband and father, enjoying to the full the love and confidence of those who were near and dear to him.

His work is done; he has passed away leaving a heritage of great example to Bench and Bar, and our public life is the poorer by the death of such as he. His memory will long be with us and his name will often be upon our lips.

BUTLER ASPINALL.

# VIII.—CURRENT NOTES ON INTERNATIONAL LAW.

## Japan and California.

Admiration is due to the impressive and high-minded fashion in which the United States President and his Secretary of State are dealing with the problem of Californian jealousy of Japanese settlers. They have set themselves to attack the problem in a tactful and sensible way, convinced that there ought to be a reasonable solution of every difficulty for large-minded and tolerant people. If they are met in a similar spirit in Japan (and the history of Japan gives us every reason to feel certain that they will), there need be little doubt of a satisfactory settlement. The conflict between State autonomy and Federal obligations is, of course, perennial. It is, however, rather surprising to see it break out over a question of the right of aliens to hold land. For it is usually considered a great indulgence to foreigners to permit them to acquire land at all.

The complaint of Japan is, not so much that her subjects are not permitted to acquire land, but that other foreigners are. In other words, it is the discrimination to which she principally objects, and declares to be contrary to treaty. By the Treaty of 1894, enlarged in 1911, she is accorded "most-favoured nation" privileges. These naturally do not extend to political rights. The exclusion of Asiatic aliens from admission to United States citizenship is no infraction of the Treaty. But it would be an infraction if the private rights of aliens were cut down by provisions which would exclude the bulk of the Japanese nation from their exercise. And, by excluding from power to acquire land in California persons who are excluded from citizenship, the Californian legislature excludes Asiatics, and consequently almost all Japanese (Lafcadio Hearn would have furnished an exception).

Are, then, rights of acquiring land within the Treaty? The answer is plain. Its words expressly include land. If (as we assume) the Treaty of 1911 is in the same terms as the French Treaty (see Clunet, *Journal*, 1913, p. 302), Japanese are entitled "to possess, or hire and occupy the houses . . . . and premises which may be necessary for them and to lease land for the purposes of residence, or for use for lawful commercial, industrial, manufacturing *or other* purposes" (Art. I (4)), and (I (5)) they may "freely acquire and possess every description of movable and *immovable* property which is capable by the territorial law of being acquired or possessed by the subjects of any other foreign country." These provisions are much more explicit than those of the Treaty of 1894, which had made no express reference to immovables, and had limited the purposes for which houses, &c., might be possessed to purposes of residence and commerce, thus implicitly excluding agriculture.

The very difficult question thus arises, how far is the United States Government bound to see that the Japanese are enabled to buy land against the will of the State authorities? In general, a government which undertakes such obligations merely contracts that it will not itself impose any obstacles in the way of the foreigners. It does not undertake to remove them when imposed by individuals. It does not force private persons to sell. It does not prohibit private persons from exercising pressure on owners not to sell. On the whole, especially in this case, where the existence of local Governments with extensive powers is well known, one may fairly come to the conclusion that it was not intended to give any undertaking to guarantee that the separate States would not use these powers, as a private individual might use his, in a sense adverse to the Treaty. The obvious answer is that such a construction makes the Treaty worthless. But that is not quite accurate. Federal action directed

against foreign land-owning would be much more effective and sweeping than such action as isolated States can take.

It is rumoured that the President has invited the Japanese to exercise measures of retorsion. Herein lies the strength of the Executive as against a refractory State. The President can simply decline to use the forces of the Union to help it. No doubt, public opinion in the States would not tolerate a foreign invasion of any member of the Union. But there are many processes short of this which the President might allow to pass without challenge.

### The "Carthage" and "Manouba."

Early in 1912 the Italians, during their war with Turkey, seized the C.G.T. *Carthage* on the ground that an aëroplane on board was destined for the Turkish forces in Tripoli. The ship's destination was Tunis: and the case shows the utter disorganisation into which the trade of a neutral port may be thrown by the Declaration of London. By that instrument (on whose terms the Italians were acting) warlike *matériel* may be captured without any need to show that the ship which is carrying them is actually bound for an enemy's port (Art. 30). Here we have the trade of Tunis threatened with complete interruption, in order that Italians might satisfy themselves that it was doing them no harm. It does not matter that aëroplanes are not within the Declaration's definition of warlike *matériel*: there are plenty of other objects which are. Had it not been for M. Poincaré's vigorous protests, this capture would have been the first of a long series. No one can suppose that the very moderate damages awarded a year subsequently would operate as a deterrent against such a course.

For the five days' detention of the *Carthage* £6,400 was found to be due (£1,000 of which was for the aviator, and the remainder nearly in equal proportions for the owners

on the one hand, and the cargo-owners and passengers on the other). In the *Manouba* case 4,000 francs only were awarded. That vessel, *ex* Marseilles for Tunis, was seized on 19th January, 1912, and taken to Cagliari, in Sardinia, where 29 Turks, alleged to be carrying arms and cash to Tripoli, were taken out of her. They were really members of a Red Crescent mission; and here again the Declaration of London, allowing combatants to be seized on board any ship wherever destined (a provision (Art. 47) which it is amazing that a British Minister should ever have signed), gives occasion for serious interference with the communications of neutral ports. Even after the non-combatant character of these Turks was established, the Italians detained them. Not until 27th January, when the agreement of arbitration was concluded, were they released.

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Now £160 is a ludicrous amount of damages in a case like the *Manouba*. The violation of French hospitality was serious. What future commander will hesitate to take drastic measures with neutral commerce if he is only involving his Government in the possible payment in the far-distant future of £160? The real ground for satisfaction in these unpleasant cases is not the whitewashing judgment rendered on 6th May at the Hague, in which the Italians, like the Russian heroes of the Doggerbank, were exonerated from all culpability. It is the spirit which was evoked in France by the Italian action, and which prevented the recurrence of such autocratic acts of interference.

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## Criminal Jurisdiction.

Considerable astonishment appears to have been felt in the British Parliament at the fact that a British subject cannot go to a foreign country without being liable to be called to account for what he has done outside it. But it is

clear that no State can be expected to refrain from executing judgment upon a person who has in its view injured it, should he come upon its territory. Some States, like our own, take the view that crime is territorial, and magnanimously refrain from prosecuting foreigners (or, indeed, their own subjects) on account of acts committed abroad. Few, if any, are prepared to inflict penalties for all offences against their own laws wherever committed. But many take the intermediate course of penalising offences against themselves and their security when they get the opportunity. France is conspicuous in this respect, but Germany and Italy adopt the same principle. Others take cognizance of offences against their subjects as well.

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A Mr. Moore was arrested in Belgian Africa on a charge of libel. The libels—so-styled—were published in British South Africa. But the principle just mentioned legitimates the prosecution, if they were supposed to be reflections on the Government, or persons concerned in it, or, at any rate, on Belgian subjects. Even had they not been such, and had been concerned with foreigners solely, the fine point might be taken that Mr. Moore published the statements in Belgian territory, though remaining outside it, just as if he had thrown them across the frontier. A Belgian subject who shot an Englishman from Belgian territory would be fairly within the competence of a British Court to try if he subsequently entered British territory, even on the theory that "crime is territorial." And it has been judicially held that a false pretence made by being posted in Glasgow for delivery in Durham is perpetrated "in England." (*R* v. *Ellis*, L. R. [1899], 1 Q. B. 230).

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On the whole, there is not much sense in the contention that "crime is territorial." Its advocates allege that if a State imposes penalties on crimes committed outside its

borders, it thereby dictates to foreigners abroad how they shall behave. But that is to assume what is disputed—that the object of penalties is to prevent crime. We have no right to reject the competing theory that the object of penalties is to modify the outrageous attitude of the offender. If a community finds one whom it considers as a criminal in its midst, is it not to attempt this task, nor to secure itself against him, simply because his crime was committed abroad? And even adopting the theory that the Criminal law is established merely to deter, is there any harm in one State attempting to influence the conduct of persons in another? It can certainly do so to a very large extent apart from all questions of judicial process.

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The case of Mr. Moore recalls forcibly the once celebrated *Cutting Case*. There the alleged libels were published by a Texan in Texas, and imputed swindling and fraud to a Mexican. The accused was arrested at the end of June, 1886, in Mexico, detained until August 6, and then sentenced to a year's imprisonment and a substantial fine. He was released "on the application of the prosecutor" on August 26; but the Mexican diplomatist Mariscal, successfully resisted the claim of the United States for compensation. (*Foreign Relations of the United States*, 1887, p. 762; *ib.*, 1888, p. 1140.)

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## Capitulations.

The vexed question of the position of Westerners in Oriental lands has again been brought to the front by the case of Mr. Adamovitz, who was arrested in Egypt at the instance of the Russian Consul-General on a charge of infringing the Russian law in his capacity of a trade union leader. As the intention was to deport him from Egypt to Russia, great interest was at once excited, particularly in trade union circles, in England. Sir E. Grey made the surprising statement in Parliament that it was "impossible

to interfere between a foreign subject and his consul": he denied that the removal of Adamovitz from Egypt would constitute extradition: and apparently he took the view that Adamovitz, being in Egypt, was to all intents and purposes in Russia.

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Such an attitude displays a touching faith in the infallibility of the late Mr. Hall. In his book, "*The Foreign Jurisdiction of the Crown*," that author develops a theory which would fully sustain Sir E. Grey's view. Unfortunately, it is a theory which is quite inconsistent with the facts. It postulates that the subjects of treaty powers in the Ottoman dominions are entirely withdrawn from the authority of the Sultan, and may be regarded as virtually members of the trains of their respective Ambassadors. That is by no means the case. As Sir F. Piggott shows, they are primarily under the jurisdiction of the local authority, just as foreigners are in any other part of the world. It is by a concession of that authority that they and their quarrels are tried by judges appointed by their own kings. Such judges are really the Sultan's judges, since it is by his authority alone that they try cases in his dominions. Thus there is involved in the existence of such jurisdiction no ex-territoriality (such as an Ambassador's suite enjoy), no power of deportation, and no question of extradition. The accused, in a criminal case, is not extradited to a foreign country—he is tried in an Ottoman Court, though an anomalous one.

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It is true that occasionally such an offender is, in fact, sent home for trial—or for subsequent imprisonment; and Mr. Hall makes the most of it. But such concessions to convenience constitute no binding obligation. That Turkey should offer no objection when an alleged foreign scoundrel is taken out of the country can surely work no prejudice to her sovereignty. Nations constantly give up

criminals whom they are not bound to extradite. But that does not lay on them any obligation to do so. And that no obligation exists in this case is evident from the well-known events of 1849. After the failure of the Hungarian Insurrection, many refugees of Austrian and Polish origin, including Kossuth, took refuge in the Ottoman dominions. As Mr. Wolf points out, neither the Russian nor the Austrian Government so much as conceived the idea of arresting them and bringing them to Vienna and Warsaw. They never urged that, being in Turkey, Kossuth and his fellows were constructively in the Austrian and Russian dominions already. Instead, they asked straighforwardly for their "extradition," under the terms of an extradition Treaty. Britain and France supported the Sultan in his refusal to accord it, urging that the Treaty gave Turkey the option of expelling the refugees. After great tension and pressure, the demand was abandoned. How is this consistent with the theory that—" we cannot interfere between a foreign subject and his consul ? "

It is inconceivable that the local sovereign could not (for instance) pardon a foreigner convicted in the consular Court. But a much stronger illustration of the limited extent to which the concession of jurisdiction to the foreign consul operates is seen in the Joris case.[1]

Joris, a Belgian living in Turkey, attempted to kill Sultan Abdul Hamid in 1905. Was he remitted to the consular jurisdiction ? On the contrary, he was examined, tried and condemned by the Ottoman tribunals. Belgium protested, but the honours of the controversy remained with the Turks. Even the Belgian protest did not proceed on the footing that Joris was constructively in Belgium all along. In fact, the wording of the capitulations is so obscure and ambiguous that it is easy to interpret them in a sense which reduces the consular powers to *nil*. It may not be the fact that (as

[1] See L. M. & R., 5th Ser., Vol. XXXI, 1906, p. 338.

has been alleged) the base of the capitulations was Turkish pride rather than Frankish suspicion. But the concession made is in terms extremely narrow. It only provides for the presence of their consul at the trials of foreign offenders. This has grown by mere usage into trial by the consul. But the attempt to convert into law the further usage to allow the consul to deport the accused (and even to deport an unaccused person) is plainly hopeless.

A fine-spun defence of the alleged omnipotence of the consul might be elaborated as follows. The consul applies his foreign law to the case. The foreign law, being that of an autocratic country, or else being the autocratic consular supplement to the law of a constitutional country, may compel the individual to obey the consul's mandate to return home. The assumption of any such liability in the Ottoman Government to force foreigners to submit to such ukases is quite unwarranted. Consular proclamations in aid of the local law differ *toto cœlo* from consular proclamations in defiance of it. The capitulations expressly regard the case of foreigners accused of those acts which are universally accounted criminal. They specify murders and other flagitious acts "committed among themselves" in the foreign community. By usage, they have been extended to cases in which native Turks are the injured parties. By usage, the principles and penalties of the foreign law have been applied to the facts proved. By usage, the prohibitions of the consul, based upon local susceptibilities, have been added to the ordinary foreign law. But how can all these practical concessions authorise a foreign power to demand, as of right, Ottoman acquiescence in making its subjects comply with its arbitrary and self-regarding directions?

The Ottoman Government has alone been referred to above. It is the ancient Ottoman capitulations which still

bind Egypt. But the principle is the same, whatever country is in question; save in so far as the specific terms of the agreement with the Western Powers modify its operation. The language of such undertakings is regrettably loose and vague. But to convert supplementary usage into law, in the face of such cases as those of Kossuth and Joris, is an enterprise of much hardihood. It is plain that no government, however Oriental, could tolerate the inclusion within its borders of a body of foreigners who are withdrawn altogether from its control in theory; though it may well abandon them in practice to the tender mercies of their consuls. In Morocco things did reach this pitch—and we know the result. Suppose such a foreigner to be guilty of treason to the local sovereign: if only his own consul and his own law have anything to do with him, he has committed no crime whatever, unless the consul happens to have graciously issued a prohibition against such practices!

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## China's Republic.

The delay in the recognition of the Chinese Republic appears to be occasioned mainly by the desire of the principal Powers to make the acceptance of loans on somewhat onerous terms by China a condition of recognition. It is not clear what is involved in the somewhat vague term "recognition." When used with regard to a new State, which is fighting for its separate existence, the word has a very definite meaning. It imports that, in spite of the rights of the parent State, the Power which accords "recognition" will enter into relations with the new State as an international entity. But in the case of an existing State like China, where there has merely taken place a change of government, the phrase is meaningless. There is no parent State whose rights are in any way affected. China needs no "recognition." In her case the phrase

simply means that the Power which is asked to accord "recognition" is asked to continue friendly relations with China under its new government. It is not a new State.

Of course one State is perfectly entitled to discontinue official relations with another if it pleases. But so long as the established government is struggling to maintain itself, it would be inadmissible for any State whatever to assist those who are seeking to overthrow its rule. Contrary to Hall's opinion, the present writer believes that it is not improper for such a State to intervene in order to support the established government. For the latter represents the organisation of the State: and it is this organism, and not the fortuitous population within its territorial limits, which foreign Powers are under a duty to respect. As long, therefore, as the position of the republican government was in any way actively assailed by the imperial forces, foreign nations might properly have intervened to support the latter. But nothing of the kind happened. The success of the new *régime* was immediate. The former government (in a fashion which must be extremely rare) formally constituted it its successor. "Recognition," therefore, can do China no good in any legal sense. Intervention to restore the Manchus is evidently impossible, as well as illegal.

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What is really meant, however, is that the Powers should resume their former diplomatic and consular intercourse with China. Mr. Wu, in his well-drawn-up monograph on the subject, urges that stagnation of trade is the result of the present position. But this is surely rather the outcome of the prevalent uneasiness as to the stability of the Republic and as to its power to guarantee security, than of any informality in the intercourse of the government with foreign powers. Morally, however, the effect of the non-recognition

of the new *régime* is deplorable. It can only be with ulterior motives of self-interest that the nations persist in holding aloof from the established government of a recognised State. It is understood that Brazil has been the first to break through this policy of exclusion: she will, no doubt, reap a reward in the shape of increased trade and goodwill in the Flowery Land.

## "Titanic" Problems.

The loss of the *Titanic* has inevitably produced a considerable amount of litigation. The claims, when life claims are taken into consideration, are naturally enormous, and the amount to which the owners can limit their liability (further than it is already limited by the fact of their forming a juristic person) becomes correspondingly important. Consequently, a limitation suit was commenced in the State of New York. In default of such process, the very considerable property of the owners within, and resorting to, that jurisdiction would be liable to execution on a judgment *in personam*, should such be obtained there or in England. Now limitation of liability is no part of the general maritime law. It rests on the legislation of individual States, and the legislations of New York and of Great Britain regulate it in different ways. Was the limitation, then, to be allowed at all? And if so, was it to be fixed by the law of England or the law of New York? These are very divergent. The English rule at £15 per ton would give the injured parties over £600,000. The United States rule, enacted in 1851, would accord them only the residuum after the collision; *i. e.*, about £20,000 worth of boats and freight.

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The petitioners urged that it should be decided according to the *lex fori*. It is difficult to see the reason for this argument. The *lex fori* applies to questions of procedure; and it was thought a considerable stretch of the principle when it

was applied in the shape of sect. 4 of the Statute of Frauds so as to render an unwritten contract worthless for purposes of suit in England. As regards the limitation of liability, there is no question of mere procedure. Consequently the contest was really between applying the English rule or none. The Court (United States Court for the Southern District of New York, *cor.* Holt, J.) was evidently right in holding that to the case of injury inflicted on board a British ship on the high seas by alleged negligent collision with an iceberg, the British legislation applied. The case might have been different had a ship of another nationality been concerned. In that event, the English practice, until altered by legislation, was to disregard the limitation rule as inapplicable. (*The Carl Johan*, 3 Hagg. Adm. 186.) In America, the view appears to have been held at one time that, at any rate upon surrender of the wreck, limitation of liability to the value of wreck and freight could be claimed in any event under the Act of 1851 as declaratory of the general maritime law: and in some cases unlimited liability was only admitted on proof of acts inconsistent with such a surrender. In the case of the *Titanic's* very old sister, the *Atlantic* (whose loss made such a sensation in the early seventies), limitation was allowed even in the case of a British steamer wrecked in Nova Scotia, on this sweeping theory of a "general maritime law" of limitation. (*Levinson* v. *O. S. N. Co.*, 15 Fed. Cas. 422: *cf. Marckwald* v. *Same*, 11 Hun, 462.) But in *The Scotland* (105 U. S. 24) pending since 1866, and decided in 1881 by the Supreme Court of the United States, the theory in this extreme form was exploded. It was declared inapplicable to cases where one flag was alone concerned. However, it was somewhat illogically held to apply where different flags were involved. The same result was thus arrived at as was ultimately obtained in England by legistion. But it is difficult to accept as a "general maritime law," a rule introduced at a given moment by a municipal

statute. It is not here a question of varying interpretations of a supposed common "general maritime law," but of applying as "general" law that which is perfectly well known to be particular law, introduced for the purpose of innovation.

"The rule exempting shipowners from liability on surrender of the ship and freight does not," says Holt, J., "seem ever to have been universally adopted throughout Europe. It is stated as a rule of Maritime law in the *Consolato del Mare*, . . . . but there is no reference to such a rule in the Laws of Oleron or of Wisby, or of the Hanse towns. No such rule was ever recognised in the English Courts, either of Admiralty or Common law, until the Act of 1813, which adopted the rule by statute; and it is now well settled that no such rule was ever in force in this country until the Act of 1851."

In *The Belgenland* ([1885], 114 U.S. 355), a modification was made in the doctrine of *The Scotland*. If the ships concerned had the same rule, that, and not the American, would be applied; and this was approved in *La Bourgogne* (210 U.S. 95). Nevertheless, in *The State of Virginia* (60 Fed. 1018), the American limitation was allowed to a British ship, wrecked in Canada, in spite of the qualification stated by the Supreme Court in *The Scotland Case*. In these circumstances, the Court in the case of the *Titanic* rejected the American rule, and held the British limitation to be the correct one. The effect of the American statute was not, though it might have been, to displace the British rule in a case affecting solely a British ship.

TH. B.

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## IX.—NOTES ON RECENT CASES (ENGLISH).

THE case of *In re Badger* (L. R. [1913], 1 Ch. 385), is rather humiliating to lawyers. Their view of the law is supposed to be that of Blackstone and Coke —that English law is the perfection of human wisdom.

The lay view was expressed by Mr. Tony Weller in the pithy phrase, that "the law is a hass." *In re Badger* (*supra*) shows that the latter view is not always entirely unfounded. There a girl infant, the daughter of a widowed mother without means, was entitled to a reversionary interest in real estate. An application was made to the Court for leave to charge such reversionary interest with loans for the maintenance of the infant. The Court, which would willingly have given such permission, found that previous decisions had so tied its hands that it could not do so. Therefore the infant girl entitled to this reversionary interest may die of hunger while owning property which, is she were of age, she could sell for an amount that would keep her and her mother from penury for their lives. Was it not one of Molière's doctors who protested vehemently against saving a patient's life by breaking a principle of medical treatment?

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The perpetual rule against perpetuities again came up for consideration in *In re Fane, Fane* v. *Fane* (L. R. [1913], 1 Ch. 404). There a testator, by his will, left property to his widow for life, and on her death directed his trustees to settle it on the trusts on which other property should be settled at that date. When the widow died the other property was settled on trusts, all of which, if they had been inserted in the testator's will, would have been good within the rule against perpetuities. Eve, J., however, held that the direction to settle the property was bad, as it *might* at the date of the will or subsequently have been settled on trusts some of which would have been bad as contrary to that rule. This decision the Court of Appeal has now reversed, and obviously, correctly. Where an instrument directs the future creation of trusts or of estates, it has always been held that the point is not what trusts or estates might have been, but what in fact are created.

If those actually created when read into the instrument creating the power are within the rule against perpetuities they are valid.

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"There is no knowledge, case or point in law," says Coke (Co. Litt. 9a), "seeme it of never so little account, but will stand our student in stead at one time or other." This is proved by the case of *In re Seymour, Fielding* v. *Seymour*, L. R. [1913], 1 Ch. 475. There the question was, what amounts to the delivery of a deed. A lady's attorney executed a deed of gift on her behalf which was outside his power of attorney. The deed was submitted to the lady who expressed her full approval of it. Did this expression amount to a delivery by herself of the deed? A large amount of ancient learning was cited in argument, and yet the point was settled by authority if ever a point was. Strange to say, the decision most relevant was not referred to. That was the decision of Bayley, J., in *Doe* v. *Knight*, 5 B. & C. 671, who there says, that the sole question in such a case is: Did or did not the maker of the deed do or say something which showed that he intended the instrument to operate at once? No formal act is necessary. As Coke says, "A deed may be delivered by words without actual touch, or by touch without words." Here the lady expressed approval of the deed, and declared more than once that the property it purported to dispose of belonged to the donee under it.

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*In re Ackerley, Chapman* v. *Andrew*, L. R. [1913], 1 Ch. 510, seems to us a somewhat doubtful decision. There a wife having a special power to appoint a life interest in settled funds to her husband, and a general power to appoint the funds in case no child of hers attained the age of twenty-one, or being a girl married, by her will left all her real and personal property "which I have power to dis-

pose of by my will" to her husband "absolutely." She had at her death a daughter (by her first husband) who had not attained the age of twenty-one or married. Sargant, J., held that this gift executed not merely the general power to appoint the settled property if the child died before attaining twenty-one or marrying, but also the special power to appoint a life interest to her husband. This decision seems scarcely consistent with the word "absolutely" in the will or with the rule that where general words of appointment may be satisfied without reference to a special power, the special power will not be held to be exercised.

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Two will cases (*In re Whiting, Ormond* v. *de Launay*, L. R. [1913], 2 Ch. 1, and *In re Haygarth, Wickham* v. *Haygarth*, L. R. [1913], 2 Ch. 9) are interesting examples of the very strong reaction against interpreting wills by precedent. We have often protested that it is only by a fiction that the interpretation of a document is regarded as a point of law. Truly it is a point of fact. It was only held to be a point of law in order to reserve it to the judge, who, as most sane people will admit, is infinitely more capable of interpreting a legal document than a jury of laymen. Still, all the same, in every case the question really is, What did the maker of the instrument intend? If that is made clear, no rule of interpretation can—though sometimes a rule of law (like that in *Shelley's Case*; see *In re Simcoe*, L. R. [1913], 1 Ch. 553) may—defeat the intention.

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In *In re Whiting (supra)*, Joyce, J., after dwelling on this point held, where the residue had by a will been divided between forty-six persons who did not take as a class, and by a codicil the gifts to two of the legatees were revoked, that the whole residue went among the remaining forty-four persons, notwithstanding a decision of the House of Lords almost on all fours and precisely to the contrary (*Cheslyn*

v. *Cresswell* [1763], 3 Bro. P. C. 246). Again in *In re Haygarth (supra)*, where a hotchpot clause which the general tenour of the will showed plainly was intended to apply to all of the three shares taken by three legatees, or if dead by their issue, but which in fact was only expressly applied to the case of the issue taking, was held to apply where the original legatees took also. This seems a somewhat strong use of the power of the Court to supply words. After all, by statute the whole will of a testator must be in writing, and to insert a clause either to give or to take away a gift seems hardly consistent with this, however clear the intention of the testator may be. (See *Scalé* v. *Rawlins*, L. R. [1892], A. C. 342).

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The following decisions are worth noting. A limited company is not entitled to sell its undertaking for shares in a new company, under the pretence that the whole transaction is a compromise or arrangement under sect. 120 of the Companies (Consolidation) Act 1908. (*In re General Motor Cab Company Limited*, L. R. [1913], 1 Ch. 377.) And a company that has power to sell its undertaking to another company for shares in that company must proceed by special resolution, authorising the liquidator to accept such shares as consideration for the sale, in order that the rights of dissentient shareholders, under sect. 192 (3) of the Companies (Consolidation) Act 1908, may be preserved. (*Etheridge* v. *Central Uruguay Northern Extension Railway Coy., Ltd.*, L. R. [1913], 1 Ch. 425.) Where the owner of property who has mortgaged it by deposit of title deeds afterwards effects a legal mortgage, subject to such mortgage by deposit, there is no duty on the legal mortgagee to give the mortgagee by deposit notice of his mortgage. Accordingly, if the mortgagor pays off the mortgage by deposit, and getting the title deeds re-mortgages the property by deposit again, without disclosing to the new

equitable mortgagee the existence of the legal mortgage, the latter is entitled to priority over the equitable mortgagee. (*Grierson* v. *National Provincial Bank of England Ltd.*, L. R. [1913], 2 Ch. 18.) Lastly, the mortgage of an interest in the proceeds of land held on trust for sale, is a mortgage of an interest in land within the Real Property Limitation Acts 1833 and 1874, and accordingly, if there is no payment of interest and no acknowledgment in writing of the title of the mortgagee for twelve years his claim is barred. (*In re Fox, Brooks* v. *Marston*, L. R. [1913], 2 Ch. 75.)

J. A. S.

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As a submission to arbitration can only, unless a contrary power is retained in it, be revoked by leave of the Court or a judge, the principles on which the judicial authority will guide itself are welcome announcements. *Bristol Corporation* v. *Aird (John) & Co.*, (L. R. [1913], A. C. 241) is a recent case which affords some light on these principles beyond that which previously decided cases had relieved from obscurity. For instance, any one of the parties who together voluntarily assign to arbitration the decision of disputes which may thereafter arise under the contract, would be estopped from alleging that the mode of settlement would be unfair or unsuitable. What to the special circumstances of each case the Court will give full consideration while favouring the maintenance of the agreement, and, on this ground, excluding from review any circumstances known to the parties or within their reasonable anticipation at the time the agreement was entered into. Such special circumstances in the *Bristol Corporation Case* led the Court of Appeal unanimously to order relief from an arbitration clause. And this decision the House of Lords have supported; but with a somewhat cold assent on the part of Lord Moulton who founded his approval "mainly from a feeling that on a question of judicial discretion one ought not lightly to allow an appeal from a Court which has not proceeded on wrong 'judicial

lines.'" The judgment seems to have led to the publication in the Law Reports of May last of the case of *Hickman* v. *Roberts*, decided as long ago as May 1911, in which it appeared that the arbitrator had not throughout maintained a judicial position.

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It would seem a sufficient precaution on the part of a shipowner to except, in a bill of lading, liability for fire, perils of the sea, negligence of any sort, even in stowing, and to fortify still further his protection by stipulating that the maintenance of the vessel's class by upkeep should be considered a fulfilment of every duty or warranty of his, whether before or after the commencement of the voyage. Apparently no obligation remained that carpenters and painters could not carry out. But unseaworthiness is a magnitude of immunity to which the exceptions did not reach. Probably few owners would venture, for several reasons, to make such an exception in definite words in a bill of lading. And Scrutton, J., decides in *Ingram & Royle Ltd.* v. *Services Maritime du Treport* (L. R. [1913], 1 K. B. 538), that to secure himself from such a liability the owner must use clear language. As a large quantity of sodium, which fires and explodes on contact with water had been stowed on deck inadequately protected, and as proper protection could not be given during the voyage, the ship, which was lost soon after she put to sea, was held to be unseaworthy when she left port, and rightly therefore the plaintiff succeeded.

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It is common knowledge that *Nichols* v. *Marsland* answered in the affirmative the point queried in *Fletcher* v. *Rylands*, whether a man could be excused from liability for damage caused by the escape of something dangerous, unless impregnably secured, which he had brought for his own purpose on to his land, if the escape was in consequence

of *vis major* or the act of God. This immunity established by *Nichols* v. *Marsland* is now definitely extended by *Rickards* v. *Lothian* (L. R. [1913], A. C. 263), which affords protection to the harbourer when the release of the dangerous thing is effected by the Act of a third person. Although there is nothing novel in the decision, the three cases form a convenient sequence on this branch of the law of negligence, which define the primary hazard and the exemption where *vis major* or some act either of mischief or enmity of a third person has destroyed what otherwise would have been safeguards against peril.

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Not impossibly it might be within the attainment of literary effort to express the text of section 118 of the County Court Act 1888 a little more clearly; and the same may be true of the interpretation of the section by the Court of Appeal in *Cubison* v. *Mayo* (L. R. [1896], 1 Q. B. 246). But it seems plain that the concluding part of the section which deprives a solicitor of a right to recover from his client "such costs and charges unless they shall have been allowed on taxation" refers solely to the case where either of the parties has expressly applied to have the costs taxed by the registrar. And it is not less plain that *Cubison* v. *Mayo* decided to that effect, for Esher, M.R., and Lopes, L.J., both held that the deprivation of the solicitor's right "does not apply when there has been no application for taxation." And Rigby, L.J., decided to the same effect. The judgment, therefore, is well founded in the recent case of *Bell* v. *Girdlestone* (L. R. [1913], 2 K. B. 225), that taxation of costs between solicitor and client is not a condition precedent to an action to recover costs.

The conditions that empower a trustee in bankruptcy to recover property which the bankrupt, within three months before a petition is presented, has transferred to a creditor

are well and briefly stated by Phillimore, J., in *In re Ramsay ex parte Deacon* (L. R. [1913], 2 K. B. 80): "I assume the proper view of the law to be that to constitute a fraudulent preference the debtor must be insolvent to his knowledge, and the transaction must be within the statutory period, and the Court must be satisfied that the substantial motive was to prefer the creditor and was not to obtain some advantage to the debtor." In this case where the debtor, quite insolvent, had under merely trade pressure returned some goods which the creditor had furnished him with, there might have been a chance of the creditor retaining the property which had come again into his hands if, instead of trusting to the inclemency of words, he had commenced proceedings. Beyond the suggestion of fraudulent preference one component of the trustee's success in recovery was the debtor's facile surrender to threats not supported by legal action.

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Lord Denman said, in *Cadaval* v. *Collins* (4 A. & E. [1836], 858), that *Marriott* v. *Hampton* (see *Smith's Leading Cases*, Vol. 2, p. 621) "does not decide that money obtained under compulsion of legal process can never be recovered back, but only that after a defence in an action has failed and money has been recovered in the action, it cannot be recovered back in another action." This has been somewhat extended since *Cadaval* v. *Collins*. But it has never been held that money was irrecoverable when paid in a foreign country to stay proceedings between two contestants of English domicile. But now Bray, J., in *Clydesdale Bank Ltd.* v. *Schroeder & Co.* (L. R. [1913], 2 K. B. 1), has decided that the plaintiffs, mortgagees of a ship, having paid under protest a sum of money to obtain relief from proceedings commenced in Chili to enforce an alleged lien on the vessel, have parted with any right of recovery. On behalf of the plaintiffs it seems to have been suggested that under Chilian

law they had no right to appear (possibly as being mortgagees) in proceedings for the arrest of the ship. But on this point no evidence seems to have been given. Another point submitted by them was, that according to the law of Chili the claim of the defendant must have failed. But this was not favourable to them, as Bray, J., pointed out; if such was the fact, the plaintiffs should have contested the case.

T. J. B.

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## SCOTCH CASES.

A minor agreed to accept compensation in respect of an accident, and the receipt was signed by him alone without the consent of any guardian. His father was resident in Ireland, but the son had been foris-familiated. On attaining majority, the minor raised an action against the employers for damages at Common law, pleading that the receipt for compensation granted by him was invalid on the ground of minority and lesion. The case (*McTeetridge* v. *Stewarts & Lloyds, Limited* ([1913], 1 S.L.T. 325)), raised several interesting and important questions, the principal of which was what law should govern the contract. According to the law of the minor's domicile (Ireland), the contract was an entire nullity. The Court held that the minor's capacity to enter into the contract fell to be determined according to the *lex loci contractus*. Then the question came to be, was not the contract null, even according to the law of Scotland, seeing that the minor's father was living, and that he had not consented to the compensation receipt? The Court held that the guardian's consent would have been indispensable had the minor been living with his father or under his protection; but seeing he had left his father's house and country, and was earning his own livelihood, he fell to be dealt with as a minor who had no guardians. The result was that

the Court, while refusing to set aside the compensation agreement *de plano*, allowed a proof before answer.

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There will be found in the *Craig Line Steamship Co.* v. *The North British Storage Co.* ([1913], 1 S.L.T. 453) a useful discussion by Lord Hunter as to the question of onus of proof in a claim by consignees against shipowners for short delivery of cargo. The Common-law rule is that a shipmaster's signature to the bills of lading is sufficient evidence of the truth of their contents to throw upon the shipowner the onus of falsifying them and proving that he received a less quantity of goods to carry than is thus acknowledged by his agent. In the case mentioned the bills of lading contained a statement to the effect that the "weight, quality, quantity and contents," were unknown. Lord Hunter, after a full examination of the decided cases, found that these words shifted the onus and put on the consignee of the cargo the burden of showing that the shortage was due to the fault of the shipowner. The case was accordingly dealt with at the proof on that footing.

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An action for personal injury once instituted passes to the representative of the pursuer on his death. If, however, the injured person dies without raising action, does the right of action transmit to the executors? On this question there have been divergent views. In some cases the opinion was expressed that the moment the delict has taken place the right vests in the sufferer of it, which right is part of his patrimony, and transmits to his executors like any other piece of property. The other view was, and it has been the one which has received favor from recent decisions, particularly *Bern* v. *Montrose Asylum* (20 R. 889), that if a person who has sustained injury dies without taking steps to obtain reparation, his executor cannot take action. This left open the question

whether the only way in which the injured person could intimate his intention to enforce his right to reparation was by raising action. The institution of an action certainly is the best proof that the injured person intended to press his claim; but is it the only proof? The Court have now held, in *McEnanay* v. *The Caledonian Railway* ([1913], 1 S.L.T. 373), that there are other ways of manifesting such intention so as to give a title to executors to recover. In that case the claim had been intimated by the deceased to the third party responsible, and the deceased in his Will specially assigned to his executors his claim against the railway company. The action was raised after the death of the party injured, but it has been found that his executors had a title to pursue it.

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In *Gorbidge* v. *Sommerville* ([1913], 1 S. L. T. 389) we have a decision of importance both in respect of the peculiarity of the circumstances and the result arrived at. A lady had raised an action in the Court of Session against her husband for divorce on the ground of adultery, and she obtained decree of divorce, the action being undefended. Prior to the raising of the action the husband had been made bankrupt in England, and his trustee in bankruptcy was not a party to the case, nor received any intimation regarding it. As a result of the divorce, the income of a fund which had been payable to the husband during his life, and consequently fell to his trustee in bankruptcy, was now diverted from that purpose and made payable to the lady in respect that the divorce was equivalent to death. The action now referred to was raised by the trustee to reduce the decree of divorce on the ground that when it was granted the spouses had been domiciled in England and the Scotch Courts had no jurisdiction.

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It has been accepted as law that a trustee has no concern in matters affecting the character or status of a bankrupt,

even though his interference might result in benefit to the trust estate. For example, he cannot raise an action for damages in respect of slander or assault on the bankrupt, though such an action might result in a substantial enhancement to the bankrupt's estate. Similarly, it has always been taken for granted that the trustee cannot raise an action for divorce on behalf of the bankrupt, though the result of the divorce might be to make some fund available for the bankrupt and his creditors. In these circumstances, when *Gorbidge's Case* came before them, the First Division of the Court of Session were of opinion that the trustee had adopted the wrong course of action. Instead of trying to reduce the decree of divorce, he should simply have sued the holders of the fund, calling on them to continue the payments to him as formerly, and if they met him by pointing to the decree of divorce, he should then have joined issue with them on the point that it was a decree pronounced by a Court of no jurisdiction. It will be seen, however, that if the form of action was different, the result aimed at was the same. The Court realised this, and accordingly they did not dismiss the trustee's action, but allowed him to prove that the Court had no jurisdiction in the divorce. The result is that though a creditor or a trustee for creditors cannot intervene to defend an action of divorce, or reduce a decree of divorce on the merits, he can so intervene on such preliminary pleas as fraud or want of jurisdiction.

D. M.

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## IRISH CASES.

The application of the well-known principle, that an agreement between husband and wife providing for a *future* separation is void as being contrary to public policy, has been carefully considered in *MacMahon* v. *MacMahon* ([1913], 1 Ir. R. 154). If such an agreement is contained in an antenuptial settlement, or if the husband and wife are living

together at the time when the agreement is made, the principle appears to apply absolutely. But it does not follow that a clause in an agreement made while the parties are living apart, intended to bring about a reconciliation, is void merely because it contemplates the possibility that such reconciliation may not be permanent, and makes provision for that event. In the present case, the marriage had taken place in 1884, the parties had separated in 1900. In 1901 a reconciliation and the resumption of cohabitation were contemplated, and the deed in question was executed. It recited that the parties were now living separate from each other, but were desirous of again living together, with a provision to meet the case of any future separation, and that they had agreed that the deed should not come into operation until a reconciliation had taken place. It went on to provide that if after such reconciliation the wife should (after giving notice) again live separate from her husband, he should pay an annual sum to a trustee for her: there followed the usual covenants by the wife not to molest the husband in the event of such future separation. Thereupon the parties again lived together until 1911, when the wife separated from the husband. The present proceedings were brought to recover the annuity, and were resisted by the husband on the ground that the deed was void. The Master of the Rolls pointed out that the deed in question was not properly called a separation deed. He thought there was nothing against public policy in making a reconciliation subject to terms for the future maintenance of the wife, in the event of its not proving permanent. If the immediate and main object of a deed is to put an end to an existing separation, it is not vitiated merely by having the secondary object of providing for a future separation. This decision has subsequently been affirmed by the Court of Appeal. A very similar previous decision on the same lines is *Harrison* v. *Harrison* ([1910], 1 K. B. 35), a decision of Walton, J., trying an action without a jury.

Seldom now-a-days has a Court to consider such a question on "the old learning of fines and recoveries," as arose in *Witham* v. *Notley* ([1913], 2 Ir. R. 284). That question at first appeared to be whether actual seisin, though wrongful, was sufficient to enable the person wrongfully seised to suffer a valid recovery? In the long run the Court did not find it necessary to give a straight answer to this problem, holding that there was not sufficient evidence that the recoveror had actually disseised the person lawfully entitled—Gibson, J., in the Divisional Court, thinking that the "only piece of evidence to support disseisin is the recovery itself." The facts were curious. A testator who died in 1823 devised lands to D. and his minor children for their lives, with remainder to F. N. in tail, and remainders over. Before 1831, F. N. (being then tenant in tail in remainder) conveyed the lands to E. for the purpose of making E. a tenant to the *praecipe*: and in 1831 F. N. suffered a recovery to his own use in fee simple. Later D. and his children filed a bill in Chancery against F. N., alleging alternatively (1) that he was in possession of the lands for them and had not accounted, or (2) a wrongful disseisin by F. N. This suit was dismissed by consent, F. N. paying the costs. In the present action (brought against the occupying tenants of the lands to recover rent) the plaintiffs claimed under the will of F. N. as tenants in fee simple after the death in 1905 of the last survivor of D. and his children. The Court of Appeal held that the defendants could question the validity of the recovery, and that the plaintiffs could not succeed in the absence of proof of the disseisin of D. and his children. They recognised that in order effectively to bar an estate tail by a recovery, the tenant to the *praecipe* must have been seised of an estate of freehold, and they were apparently inclined to think that a wrongful seisin would do. But they applied the presumption that seisin follows the title: and they would not presume disseisin for the purpose of upholding a recovery suffered by a tenant in tail in remainder.

*Steele* v. *Steele* ([1913], 1 Ir. R. 292) is a good illustration, though not a new one, of a well-marked exception to the rule in *Lawes* v. *Bennett* (1 Cox, Ch. Cas. 167)—a rule often criticised, but described by Palles, C.B., in this case as "unquestionable in this, or probably in any Court." In 1899, a testator devised realty to A. for life, with remainder to his sons in tail, and made B. residuary legatee. On 1st January, 1906, the testator signed purchase-agreements with certain of his tenants for the sale of their holdings to them under the Irish Land Act 1903. In February, 1906, the testator made a codicil to his will, appointing a new executor, and expressly confirming his will in other respects. In May, 1906, the testator died. After his death the Estates Commissioners sanctioned the advance for the purchase of the holdings by the tenants. The Court of Appeal held that, notwithstanding the ordinary rule as to the effect of an agreement for the purchase of realty in effecting a conversion, there was here sufficient to show that the testator intended his interest in the lands sold to pass to A. This was shown by the codicil, executed after the purchase-agreements, operating as a republication of the will. "We have here the three circumstances which occurred in *Emuss* v. *Smith* (2 De. G. & S. 722) and *Pyle* v. *Pyle* ([1895], 1 Ch. 724)—namely, (*a*) the specific devise; (*b*) the conditional nature of the contracts for sale; (*c*) the republication, after the contracts, of the will by a codicil, which did not refer to those contracts." Incidentally the Chief Baron cast some doubt on the principle of conversion by these purchase-agreements, which is supposed to be established by *Sherlock's Estate* ([1899], 2 Ir. R. 561) and *Doyle's Estate* ([1907], 1 Ir. R. 204). He thought that a detailed examination of the provisions of the Irish Land Purchase Acts went to show that conversion did not take place. However, this was not necessary for the decision, and the other members of the Court were inclined to think that *Sherlock's Estate* was right.—J. S. B.

# Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

*The Two Hague Conferences.* By JOSEPH H. CHOATE. London: The Oxford University Press. 1913.

As a member of the Second Hague Conference, Mr. Choate is well qualified to summarise the results of that assemblage and of its predecessor. In these two popular lectures, he does so in admirable fashion. Occasionally one may dissent from isolated statements. That on p. 12, that only eight of the nations "have armaments worth speaking of," reads oddly in the light of Bulgarian prowess. And the pious hope that the Third Conference (if ever it meets) may prohibit aerial warfare, seems very far from fulfilment. Nor is the observation that "from time immemorial arbitrations have generally been the vehicle of compromise," borne out by the facts. Arbitrators cannot ignore the law: and in a well-known case the United States repudiated the King of Holland's award on the Maine Boundary question, because it adopted the view of neither party, but proposed an equitable compromise.

Mr. Choate speaks of the "predatory and apparently barbarous" attack upon Tripoli, and thinks that Britain has no really permanent hold on South Africa. In these opinions he is probably very right, but the eminence of his position makes it necessary to examine at more length than we should otherwise do in a review of this scope, a most singular statement at p. 57. Mr. Choate says that the English Press was against the Conference; "particularly the Conservative Press." There does not seem to be any truth in the suggestion that the Liberal Press adopted such an attitude. Mr. Choate ascribes it to the recent change of Government in Britain: how this could unite the Press in dispraise of the Conference is not apparent. In point of fact, the hostile attitude of *The Times* to the Second Conference was evidently due to the failure of the First. The First Conference had failed to prevent the Transvaal war or, although the Czar had been its sponsor, the Russo-Japanese war. And the extremely positive genius of the moment, whether incarnated in Shaw or Kipling, decried any movement that did not show results.

*Principles of Muhammadan Law.* By FAIZ BADRUDDIN TYABJI, M.A. Bombay: Taraporevala Sons. 1913.

The Author, who is a judge of the High Court of Madras, describes his work as "an essay at a complete statement of the personal law applicable to Muslims in British India." If this description means that the book is compiled from original sources direct, and not founded upon any earlier treatise, the volume is entitled to exceptional rank. But whatever its basis, the book is a very attractive one, both from the comparison with other codes which the subject may supply, and from the skilful way in which it is planned and displayed. Close criticism of it could be undertaken only by a person well acquainted with the subject; and qualified persons are few in number. But anyone with knowledge of it, quite vague and indistinct, would find interest in tracing the principles of the law from tradition and other sources down to their supreme adhesive element, the Koran. Of this exponent of the Muhammadan creed, the learned judge (spelling it "Quaran") gives an account from the time when, about A.D. 609 and some twenty years afterwards, the passages from the great work were inscribed on palm leaves and skins, till their final arrangement in A.D. 650. The great labour bestowed upon the "essay" may in some degree be measured from the fact that the volume extends to more than seven hundred pages.

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*Classics of International Law. Ayala de Jure et Officiis Bellicis et Disciplina Militari, Libri III.* 2 vols. Edited by J. WESTLAKE, LL.D., D.C.L., K.C. Washington: The Carnegie Institution. 1912.

It is very fitting that as Professor Holland was responsible for the first volumes of this series—the International work of Zouch—the second set should have been committed to the late Professor Westlake. The same anxious photographic reproduction of the sixteenth century text, the same critical and biographical apparatus, the same care for the mental equipment of non-Latinists, are as apparent in these substantial volumes as in the first set. We need not say that the twenty-seven pages of Introduction are as good as they possibly could be, nor that Dr. Pawley Bate's translation is scholarly and clear.

Ayala's book is said to be extremely rare. It is one of the main sources of our knowledge of that Law of War, which, as Holland has

pointed out in his *Studies in International Law*, played so great a part under stress of the Wars of Religion, in developing the International law of the modern world. The Author's portrait (from a volume of Belgian prints published in 1608) adorns the frontispiece, and shows a soldierly countenance, with a slight frown and a composed expression. He was, of course, a Spaniard by descent, though born in Antwerp of a Flemish mother. Westlake considers him "essentially a Netherlander" (though one of his brothers was Spanish Ambassador to France), and he studied at Louvain. As is well known, he became "Judge-Advocate General" of the Imperial army in the Netherlands, with an especially wide jurisdiction over the foreign (including Spanish) troops. He flourished from 1548 to 1584: his early death and the military circumstances of his career prevented his work from having the connected and coherent character which is visible in that of sedate professors like Zouch and Gentili. His originality is not great, but his learning is undoubted. Obedience, legalism, and precedent, appear to have been his beacon-lights; in his very first chapter he recurs to the *lex Julia* and the *lex regia* of Imperial Rome. Perhaps his Editor is a little hard on his "stern legality": a writer who can boldly condemn, as essentially unfair, those vicarious personal reprisals which even the modern world has by no means abandoned, cannot quite be said to make reason and humanity secondary considerations; whilst his standard of good faith is high. It is not an adherence to the letter of outworn custom that he recommends in his Preface, but a renewal of its spirit, which is indeed one of the favourite devices of reformers. His view is, in short, that there is "a great deal of human nature" in man, from age to age. Books II and III "contain little or nothing that belongs to International law": they deal with problems of statecraft and strategy, and it is rather hard to see why even a Carnegie should desire to give them world-wide publicity. The wealth of material is enormous. We extract only one illustration. In Book III, c. 18, we note that "Egnazio tells us that those who were driven by necessity to surrender the fortress of Scutari to the Turks who were besieging it, received no upbraidings on their return to Venice, for the Senate knew what the force of necessity is, and that no valour can stand up against it." Let us hope the Turks will be equally magnanimous.

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*Butterworths' Five Years' Digest 1908—1912.* Edited by GILBERT STONE. London: Butterworth & Co. 1913.

This massive collection, which must have exacted great toil and care in its preparation, will, in its use, save a larger aggregate of labour to the profession. For, under a classification similar to that adopted in Lord Halsbury's *Laws of England*, it distributes the substance of the reports of more than 5,000 cases decided in the English Courts, with that of many of those decided in the Courts of Scotland and Ireland, and even of some which have received no more permanent record than the pages of a newspaper. It is no small advantage and convenience to be able to obtain under the appropriate heading the effect of practically every decision within the long period of five years, and, by these decisions being brought into juxtaposition, to be spared a search into several volumes. To further facilitate reference, several ingenious devices are adopted of a more or less novel character.

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*The Present Law and Practice Relating to Letters Patent for Inventions.* By H. FLETCHER MOULTON. London: Butterworth & Co. 1913.

The name Fletcher Moulton is intimately connected with the subject of Patents, and the present work is dedicated to Lord Moulton. Although not the first venture of the learned Author, it is the first venture on writing a book by himself on an intricate and important subject. The text consists of seventeen chapters, all of which deal with some distinct branch of the subject. Of recent years, although there has been little or no change in Patent law, yet there has been considerable change in the Practice. Of course the Patent and Designs Act 1907 (7 Edw. VII, c. 29) introduced several changes, particularly those which refer to restrictive conditions in licences. It was only recently that the decisions of the Comptroller upon practice and other matters were made available to the practitioner. Prior to that no reports existed, and something akin to chaos was the order of the day. Mr. Fletcher Moulton has availed himself of all sources of information in that respect, especially in availing himself of the valuable experience of Mr. W J. Tennant, all of which tends to make his chapter on Patent Office Practice complete and illuminating. The subject of drafting specifications is one that calls for uniformity, and some valuable hints are given.

Mr. Fletcher Moulton, both by the handling of his subject and by his lucidity, proves that there is something in the doctrine of heredity.

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*A History of Divorce.* By S. B. KITCHIN, B.A., LL.B. London: Chapman & Hall. 1912.

At a time when there is so much discussion concerning the Reform of the Divorce Laws, a book giving the history of the subject is peculiarly welcome. We have given to us an account of the historical treatment of this question during Roman times, by the Fathers of the Early Church and by the Christian Emperors of Rome. Traced through the Eastern Church, the Canon law and Western Europe in the Middle Ages, we come to the Reformation, and so on to the French Revolution. A birds-eye view of the state of Divorce in European countries, the United States and the British Empire, is unfolded before us. Some of the views of the learned writer will cause bitter controversy and arouse antagonism. We gather that the opinions of Mr. Kitchin are in favour of regarding marriage as a question apart from religion and dogma. He thinks that there should be the same law for man and woman alike. However that may be, whether the reader agrees or not with the learned writer's views and deductions, he will be bound to confess that the relation of historical fact is free from personal bias. We do not quite agree with the Author's dogmatic statement on page 237, that imprisonment for life is still a ground for Divorce in the Union of South Africa, as forming part of the Roman-Dutch law. Of course, we are aware of the fairly recent case of *Nefler* v. *Nefler* ([1906], O. R. C., p. 7), but on the other hand, such authorities as Maasdorp and Van Zijl are doubtful, and so until the Appeal Division of the Supreme Court gives its decision, we would suggest a suspension of judgment. It is also to be noticed that the case of *Woods* v. *Woods* ([1907], T. S. 21), cited in support of the Roman-Dutch law, that refusal to pay the "carnal debt," where the parties live under the same roof, constitutes malicious desertion, did not decide that point at all. The book shows that Mr. Kitchin has a firm grasp of his subject, and has tried to present his case with a mind untrammelled by theological or canonistic considerations. For anyone who requires the history of Divorce in a small and easily understandable form, he cannot do better than read the book under review.

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*Select Charters of Trading Companies, 1530—1707* Edited for the Selden Society by CECIL T. CARR. London: Bernard Quaritch. 1913.

This constitutes the twenty-eighth volume of the Selden Society's Publications, and as is usual, shows signs of most careful preparation. Who would think of the romance wrapt up in such a title? Tales of trade, adventure, enterprise, and invention, all of which are detailed in the Introduction. The Charters date from 1530 to 1707, and number forty-one in all. The history shows that our forefathers had little, if anything, to learn from this generation on the subject of "the gentle art of company promoting." The learned Editor has prepared an Introduction, giving an account of the rise of Trading Companies and all the incidents of their existence. The amount of labour involved is apparent from the fact that this Introduction runs to 136 pages. In fact, Mr Carr is to be congratulated upon editing a volume which is quite up to the best traditions of the Selden Society.

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*Mosaicarum et Romanarum Legum Collatio* By Rev M. HYAMSON, LL.D., B.A. Oxford. Henry Frowde, Oxford University Press. 1913

This is a most profound and scholarly work, but will prove to be caviare to the ordinary legal reader. It consists of the introduction, facsimile and transcription of the Berlin Codex, together with the translation, notes, and appendices by the Author himself. The history of the *Mosaicarum et Romanarum Legum Collatio*, generally called the *Collatio*, is curious. The first reference to it is made by Hincmar, Archbishop of Rheims, who died in 882 A.D. There are apparently three manuscript codices extant, which include the *Collatio*, known respectively as the Berlin, Vienna, and Vercelli codices. The first Editor was Pierre Pithou, and it is generally surmised that he utilised the Berlin Codex In the chapter headed "The Manuscripts of the Collatio," Mr. Hyamson gives a very profound analysis of these three manuscripts. The *Collatio* itself contains sixteen titles, ranging from "murder" to "statutory succession," and *with the exception of the last title*, corresponds with the second half of the Decalogue. As to the *raison d'être* of this work, there are many conflicting authorities, *quot homines tot sententiae*. But one idea appears to be fundamental, that of giving the Roman and Mosaic systems of law upon the subjects dealt with The date when the *Collatio* was written seems also open to considerable

doubt, but probably it was quite early in the fifth century. When answering the question of authorship, we are again met with controversy on the point. Some writers claim the Author to have been a Jew, some say a Christian, some say both; again in the sixteenth century, French scholars assigned the authorship to Licinius Rufinus; in fact the discussion seems to be as acute as the Bacon-Shakespeare controversy. After the translation of the text with notes, we have given us a comparison of Biblical Texts in the *Collatio*, Vulgate, and Itala, with some interesting additional notes on Jewish law. In conclusion, the learned Author gives us textual errors and variants appearing in the *Collatio*, together with the sources from which the law was culled for compilation. The book under review must be the result of continuous and untiring research on the part of the learned Author, and reflects the utmost credit on his ripe scholarly knowledge. Mr. Hyamson claims that Roman Jurisprudence obtains more attention on the part of Continental jurists than of English, a statement which we think is open to doubt. Jurists in England of recent years have discovered that it is impossible to grasp our system of law without a fairly profound knowledge of the Roman, and that in these days of cosmopolitanism, a knowledge of Roman law is essential in order to comprehend the international questions which crop up in the everyday legal routine in this country.

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*Pilotage Law.* By E. A. Digby and S. D. Cole. London: Sweet & Maxwell. 1913.

There came into operation on April 1st an important Act, which, although hotly contested by those interested, attracted little public notice. In 1909 a Departmental Committee was appointed by the Board of Trade, which reported, in 1911, on the chaotic condition of the law relating to Pilotage. As a result of this Report came the Pilotage Act of 1913 (2 & 3 Geo. V, c. 31). Mr. Digby, retired from the Navy, acted as Secretary to the above-mentioned Departmental Committee, of which Mr. Cole was a Member. Each section of the Act has been carefully annotated with cross-references. Appendix I contains an alphabetical list of the Pilotage Districts in the United Kingdom, together with all the necessary particulars with regard to Pilotage. Appendix II contains an account of International Pilotage Law. In Appendix III the reader learns the necessary Procedure on Appeals. This useful little work should find a wide circle of readers, by reason of its obvious merits.

*The Law and Practice of the Railway and Canal Commissioners' Court.* By E. E. G. WILLIAMS. London: Butterworth & Co. 1913.

This useful work is divided into two Parts. Part I is headed, "The Law," and Part II, "The Practice." The Commissioners have a very wide jurisdiction, and consist of two appointed and three *ex-officio* Commissioners, the former being nominated by the President of the Board of Trade, whereas the *ex-officio* members are Superior Court Judges. They sit in various parts of the country and decide questions, mostly of facilities, service, and rates in connection with our railways and canals. The procedure in force runs very much on the lines of an ordinary Common law action. In the Appendices are included (A) Precedents of Applications; (B) Rules; (C) Statutes. Few realise the variety of questions which crop up in this connection, and Mr. Williams acts as a sure guide to any practitioner unacquainted with these matters. The whole "get up" of this book appeals very strongly to us, and the learned Author is to be highly congratulated upon the production.

*The World's Legal Philosophies.* By FRITZ BEROLZHEIMER. Translated from the German by RACHEL SZOLD JASTROW, with an Introduction by Sir JOHN MACDONELL and ALBERT KOCOUREK. Boston. The Boston Book Company. 1912.

This work forms the second volume of the Modern Legal Philosophy Series, selected and edited by a committee of The Association of American Law Schools, in furtherance of the resolution passed at the annual meeting of the Association in August 1910, "to arrange for the translation and publication of a series of continental master works on jurisprudence and philosophy of law."

American law is in a state of transition. The people of the United States are now standing "on the threshold of a long period of constructive readjustment and re-statement of the law in almost every department." As we stated in our notice of Professor Miraglia's *Comparative Legal Philosophy*, the third volume of this series, legal reform can only be attained in the United States, as elsewhere, after the reformers have become familiar with the world's methods of juristic thought. They must first be equipped with the state of juristic learning in the world to date. Thus equipped they may then do original work. And American law must not be a mere copy of this or that system or a combination of systems. It must be a

natural development guided and formulated by American thinkers. The present volume forms the second of Dr. Berolzheimer's great five volume work entitled *System der Rechts und Wirtschaftsphilosophie*, published at Munich, 1904—1907. President of the International Society of Legal and Economic Philosophy at Berlin, Dr. Berolzheimer is known as one of the most active of the Neo-Hegelians among legal philosophers. He has proved himself to be one of the most efficient agents in the awakening of German thought to the Philosophy of Law. The subject of the book before us is the historical evolution of the Philosophy of Law and Economics in relation to contemporary interests and movements. The political and legal institutions of former periods are included only in so far as they show influence upon later developments. The usual detailed catalogues of the successive contributions to the philosophy of law have been avoided. The Author has confined himself to the presentation of the successive cultural stages in terms of their distinctive ideas, principles, conceptions and doctrines, and of their practical issues and demands. The historical survey is therefore extended beyond the customary point of departure in ancient Greece. It includes the legal and economic institutions of Egypt, Assyria, India, Judea, and Phœnicia, from which the theory and practice of the Græco-Roman legal philosophy were derived. The break up of the Roman Empire coincided with the establishment of Christianity as a national religion, which through its ethics influenced the development of law, the organisation of government, and the freest expansion of both. But the spiritual dominance of Rome resulted in the bondage, spiritual and social, of the individual during the Middle Ages. With the Reformation commenced that process of emancipation which on the political side culminated in the French Revolution. This period witnessed the rise and decline of "Natural law." After tracing the legal philosophies of the 17th and 18th centuries, Professor Berolzheimer passes in review the effect of economic realism, as exhibited in French communism, German socialism and anarchism, upon the philosophy of law. In the final chapter he deals with the reconstruction of the philosophy of law from the sociological point of view, summarising the views of the leading exponents from Comte to the present time. In the expression of his own views Professor Berolzheimer is somewhat sparing. He does not hesitate, however, to enter his opposition to class domination, and he evidently fears the extreme

democratisation of social ethics leading to the dominance of the lower classes. His position is summed up in the following passage, indicating the purpose of this work :-

"The original problem of legal philosophy which Rousseau formulated and Kant accepted was the manner of association of the community through law and government, both as an expression and as a guaranty of individual freedom. This problem now demands a re-statement in consideration of altered economic conditions and intellectual outlook. Present-day interests sound a note of warning, to the effect that the emancipation of the fourth estate must not result in an enslavement of the upper classes, must not permit the intellectual gains which European civilization has achieved since the days of the Reformation to be placed at the mercy of the powers of darkness."

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*A Handbook of English Law Reports.* By J. C. Fox. London: Butterworth & Co. 1913.

This is a continuation of *Wallace on the Reporters*, a work well known to the Bar, and noticed with favour by members of the Bench. That work terminated in the memorable year 1776, when the compiler, an American, came under the new nationality of the United States. From that date down to 1865, when the Law Reports began, and the occupation of the independent reporter was gone, this volume extends the like notice to the reporters of the House of Lords, the Privy Council, and the Chancery Cases. The law reporter and his labours have been differently estimated by different writers. He has been called "a pillar of the Constitution"; and on the other hand it has been asserted of his work, that the greatest service that could be rendered to the country would be to burn all the reports of a later date than the Revolution. But even if that conflagration were ordered, this work would not lose its value. It is proposed hereafter to continue it to the Common law and Miscellaneous Reports.

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**Second Edition.** *The Marine Insurance Act 1906.* By Sir M. D. Chalmers, K.C.B., C.S.I., and Douglas Owen. London: Butterworth & Co. 1913.

Any work from the pen of Sir M. D. Chalmers is bound to attract respect from the legal profession, and additional weight is added by reason of the fact that he was the draughtsman of the Act The

first edition was published in 1907, since which date three Acts have been passed directly affecting the law of Marine Insurance: (1) The Finance Act 1908 (8 Edw. VII, c. 16); (2) The Marine Insurance (Gambling Policies) Act 1909 (9 Edw. VII, c. 12); (3) The Finance Act 1912 (2 & 3 Geo. V, c. 8). The second Act mentioned was perhaps the most important, as it made a criminal offence of what was undoubtedly a growing evil. Owing to the latitude of contract allowed to individuals, the Case law is not excessive, and in most instances are really decisions as to what the parties intended. Among the more important decisions noted are *Thames and Mersey Marine Insurance Co.* v. *Gunford Ship Co* (L. R. [1911], A. C. 529), commonly called the *Gunford Case*, *Reliance Marine Insurance Co.* v. *Duder* (17 Com. Cas. 227), which places an interpretation upon sect. 26 (3) of the Act; and *The Republic of Bolivia* v. *Indemnity Mutual Marine Assurance Co.* (L. R. [1909], 1 K. B. 735), where the Court of Appeal gave rather an interesting dissertation of the meaning of the word "piracy" when employed in a mercantile document. These and many other decisions are noted and their effect carefully weighed. An addition consists of the Rules of Practice in force with the Association of Average Adjusters. As the learned Authors state in the Preface, their object has been to compile a handbook to the Act, and not an exhaustive work on Marine Insurance, and when judged from that point of view we are bound to say that their efforts have met with complete success.

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**Third Edition.** *Cases and Opinions on International Law.* Part II.—War. Part III.—Neutrality. By PITT COBBETT, M.A., D.C.L. London: Stevens & Haynes. 1913.

*Leading Cases and Statutes on International Law.* By NORMAN BENTWICH. London: Sweet & Maxwell. 1913.

Professor Pitt Cobbett's work is now well-established as a standard text-book. The cases, while clearly stated, are, as in *White and Tudor*, made the vehicles of a great deal of interesting exposition. In the present edition, this commentary has been greatly expanded, and the work now forms a very complete introduction to the subject. Many will feel regret that Professor Cobbett should countenance the stream of thought which views with favour such doctrines as those of continuous voyage, and of a conception of Occasional Contraband dependent on mental intention. This is an attitude which, it is safe to say, would have been unthinkable fifteen years ago. It

evinces a readiness to discard the whole atmosphere of Prize law as previously understood, and we venture to say it is of no good augury for the stability of International law as a whole. The gallant efforts of Professor Cobbett and of Mr. Bentwich to explain away *The Imina Case*, afford an example of this erratic tendency. They show no appreciation of the all-important fact that no condemnations of contraband ever passed in a case where there was a neutral distinction for the vessel. *Norwaerts* should be *Vorwaerts*, at p. 394.

Mr. Bentwich, in the Preface to his very handy selection of cases believes that there is room for a book which shall be less interwoven with commentary than Professor Pitt Cobbett's, and less uniformly concerned with American cases than Mr. Snow's For that purpose a fuller statement of each case would perhaps have been appropriate. Mr. Bentwich has the high authority of Kenny's *Leading Cases in Criminal law* for a somewhat severe treatment of the authorities, but we cannot help thinking that anything short of the full case is unsatisfactory, even for the student. A series of truncated cases is only a sort of text-book. Otherwise the cases are well selected, and the Author's short summaries and notes (though occasionally *ex parte*) are helpful. The book should meet a real need.

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**Third Edition.** *Strahan and Kenrick's Digest of Equity.* By J. Andrew Strahan, assisted by C. H. Castor. London: Butterworth & Co. 1910.

This is one of a new series of students' books which the publishers are bringing out, and this one at any rate is planned with masterly skill and fully furnished out of the capacious learning of the principal Author. In a subject so subtle and complicated as Equity is, evolved out of material to which no guide or direction, beyond an innate sense of justice could be found later than the Roman law, the most difficult task a text writer can set himself is to separate and condense into brief propositions the interwoven doctrines which have grown out of centuries of decisions. This task has been encountered and brilliantly achieved. So closely filled is the volume with matter, that any illustration extracted from it would be altogether inadequate to convey an impression of its abundance. Fortunate indeed are the students of the present day to have provided for them in a clear and skilful shape the information which their seniors had to struggle after, floundering often by the way, in less balanced treatises.

**Third Edition.** *The Student's Legal History.* By R. STORRY DEANS. London: Stevens & Sons. 1913.

The study of English law by means strictly of its history is, as supplementary to text-books, the best practical way of following its developments down to the principles enforced to-day. And this work is a very neat, and as far as the main events are concerned, a complete exposition of the progress, with attendant reversals, of the law's advance. With regard to a trifling matter, one may be allowed to suggest that where in the book a law is being explained, which by a later statute or decision has been changed, a reference might be given to the reversing enactment or case. A convenient illustration may be taken from the last paragraph at page 39, relating to *De Donis*: "Henceforth a limitation to A. and heirs of his body gives an estate tail absolutely inalienable by the tenant." Here a reference to *Taltaram's Case* might with advantage be given. So again to *Taltaram's Case* might a reference be given to the Fines and Recoveries Act. This is, however, only a slight matter. The summaries which the Author has prepared of the changes made in the different epochs into which the work is divided, are of the greatest use. The book is an excellent one, and will no doubt meet with success. At page 71 there is a slight printer's error: 17 Eliz. is printed, instead of 27 Eliz.

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**Fourth Edition.** *Concise Precedents under the Companies (Consolidation) Act 1908.* By F. GORE-BROWNE, M.A., K.C., present edition by D. G. HEMMANT. London: Jordan & Sons. 1913.

The first three editions of this informing work were written by that well-known authority on Company law, Mr. F. Gore-Browne, K.C. Owing to pressure of business, a new Editor had to be selected in his place, and the choice fell upon Mr. Hemmant, who has well justified the decision.

Since the last edition the great consolidating Act, known as the Companies (Consolidation) Act 1908 (8 Edw. VII, c. 69), has been passed. This fact has necessitated almost entirely re-casting the book, so that it is patent how critical was the occasion of bringing out the new edition. Fortunately Mr. Gore-Browne has found time to advise and assist the present Editor. The portion dealing with the Winding-up of Companies has been omitted, but the sections relating to Reconstruction and Schemes of Arrangement and Compromise have been retained, as being distinct from the actual process

of Winding-up. Each section has had grouped with it all the notes and forms applicable thereto, a fact which conduces to easy reference. In Appendix D will be found a lucid statement with regard to Political, Social and other Clubs; also a suggested form of Club Rules, which together form a ready and informing guide to the reader. Appendix B gives us the necessary requirements in order to obtain a London Stock Exchange quotation. The Index is clear and forms an excellent key to the text. The language of the text is simple and lucid, as one would naturally expect from Mr. Gore-Browne. Speaking generally, we are of opinion that Mr. Hemmant has shown himself worthy to carry on the high traditions set by his distinguished predecessor, and the present edition will again prove what a high position has been attained by previous editions.

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**Seventh Edition.** *Dowell's Income Tax Laws.* By J. E. Piper, LL.B. London: Butterworth & Co. 1913.

*The Death Duties.* By Robert Dymond. London: Jordan & Sons. 1913.

*Reversion Duty.* By G. H. Devonshire, M.A., and Frank Samuel, M.A. London: Stevens & Haynes 1913.

The intricacies of the Income Tax are annually vividly brought to the notice of the average citizen when he fills in his Income Tax return, and to the lawyer whenever he looks at the Crown Paper list. It would seem as if the solution rested in the hands of the officials, as it is to be noticed that the majority of books on that and kindred subjects are written or collaborated in by Inland Revenue officials. Within that category comes Mr. Piper, who brings to his subject a rich store of knowledge, garnered as Assistant Solicitor of Inland Revenue. The above book was first written by the late Stephen Dowell, and is now in the hands of the present Editor. Special attention has been devoted to litigation and the practice and procedure appertaining thereto. The Finance (1909-10) Act 1910 introduced many new and bewildering items of Revenue, which have been ably dealt with by the learned Author. He demonstrates that he possesses a grasp of his subject which will commend the present edition to the legal world.

Mr. Dymond, who is an official in the Estate Duty Office, combines the knowledge of an official with the legal training of a solicitor. His book is divided into four Parts Part I has as its

subject Estate Duty, Part II deals with Legacy Duty, Part III includes Succession Duty, and Part IV Increment Value Duty. These four duties are payable in respect of estates of persons dying at the present time, and impose a heavy burden upon those who succeed Each subject is treated in a lucid and comprehensive manner, which will make the book of great practical utility to lawyer and layman alike.

Sections 13—15 of the Finance (1909–10) Act 1910 (10 Edw. VII, c. 8) refer specifically to Reversion Duty, and form the subject-matter of a useful little work by Messrs. Devonshire & Samuel. It is based on the Chapter dealing with the subject in a larger work by the same Authors, *Duties on Land Values*. In the present volume the text has been elaborated in somewhat greater detail, and comprises reported decisions of Referees or of the Courts. Upon this account it is to be commended as likely to be useful both to the legal profession and to the public at large.

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**Seventh Edition.** *Brooke's Notary.* By JAMES CRANSTOUN. London: Stevens & Sons. 1913.

This edition, though the seventh, is, by the amendments and extensions introduced, and still more by its whole substance having been remodelled into clearer form and re-written into closer language, a new work. Not only is it the most recent, but it will take rank at once as quite the best upon the subject. Notarial law and powers are not very widely known in England, but the functions that come within them are of high commercial importance and are exercised over nearly the whole civilised world. In foreign countries these powers are more prominently used than at home; for there they may extend beyond matters of commerce to many incidents of real property and testamentary dispositions. In the reciprocal obligations between merchants of the United Kingdom and their correspondents in the British dominions and in foreign States, the services of a notary are constantly required in such matters as bills of exchange, shipping, powers of attorney, and in certificates on a diversity of subjects; and in these the chapter on the Authentication of Documents which international relations necessitate will be of inestimable value in the directions which it furnishes of the varying and intricate requirements of different governments. The book is in every detail admirable.

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**Ninth Edition.** *Precedents of Bills of Costs.* By T. C. SUMMERHAYS, C. G. BARBER and R. S. SUMMERHAYS. London: Butterworth & Co. 1913.

Bills of Costs form a most important factor in the routine knowledge of the lawyer, and it is notorious that a bill of costs drawn one way will have many items disallowed, whereas if drawn in another way, will have few if any items struck out. Of late years, many new Scales have been introduced, and new rules applying to old Scales passed. Stringent alterations have been made with regard to Bills of Costs relating to Criminal Appeals, Privy Council, Medical Referees' Fees under the Workmen's Compensation Act, the Land Transfer Acts, &c., and many others too numerous to recall. It will thus be seen that there was plenty of material for a new edition. Again, just when the new edition was going to Press, out come the County Court Rules, 1913, which make radical alterations with regard to the question of costs. Two pages are taken up with *corrigenda* in the text, pp. xxvii and xxviii. In spite of all these additions, the learned Authors have managed to keep the book within the compass of 821 pages, and to avoid the size being unwieldy. This has been achieved by careful editorship, and by printing on a different paper from that formerly used. When consulting the book under review, the reader will find all the information necessary to equip him for drawing a serviceable Bill of Costs.

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**Tenth Edition.** *The Magistrate's General Practice.* By C. M. ATKINSON, M.A., LL.M. London: Stevens & Sons. 1913.

It is remarkable, but none the less true, that two books written on the same subject may, nevertheless, each have its own sphere of usefulness. This statement is applicable to *Stone* and to *Atkinson*. The present edition has been very carefully revised, and owing to recent legislation and judicial decision the text has undergone considerable modification. The Local Government Board on August 1st 1912, issued The Public Health (Milk and Cream) Regulations 1912, which appear in the Appendix, pp. 1341 to 1348. These will, no doubt, in turn be superseded by Mr. John Burns' new Milk Bill, which has been foreshadowed this Session. Among the new decisions, may be noted *Healey* v. *Wright* (L. R. [1912], 3 K. B. 249) upon the subject of Bastardy. The question of registration of clubs was dealt with in *Lees* v. *Lovie* (L. R. [1912], 2 K. B. 425). The question of what was an indictable

offence came up in *R.* v. *Hewitt* (L. R. [1912], 28 T. L. R. 378). A list of offences, which may be dealt with by a justice sitting alone, has been added, which will prove very useful. The general arrangement of the work has been preserved, and speaking generally, is of such excellence as one would expect from Mr. Atkinson, who holds the important position of Stipendiary Magistrate for the City of Leeds.

**Tenth Edition.** *Gibson & McLean's Students' Conveyancing.* By ALBERT GIBSON. London: Law Notes Publishing Offices. 1913.

Messrs. Gibson & Weldon are so well known as law coaches, that any book by either of them which is intended for students at once merits attention. In the present edition Mr. Gibson has sought to make this treatise useful to practitioners as well, and the result is a complete success. The *raisons d'etre* of the present edition are: 1. The Conveyancing Act 1911 (1 & 2 Geo. V, c. 37.) 2. The Finance (1909–10) Act 1910 (10 Edw. VII, c. 8.) The effect of the former was so great as to almost render obsolete previous editions. The latter introduced such alterations in the law of death duties and stamps as to almost bring about the same result. It will be obvious, then, that the learned Author has had to expend very nearly as much labour as if he had produced a new book. He has also kept in view the very important object, from the standpoint of the student, of not materially increasing the size. All of this he has done with great skill and resource, the result of which will, we hope, amply repay him.

**Tenth Edition.** *Wolstenholme's Conveyancing and Settled Land Acts.* By B. L. CHERRY, LL.B., A. E. RUSSELL, M.A., and C. V. RAWLENCE. London: Stevens & Sons. 1913.

Sir Howard Elphinstone and Mr. E. P. Wolstenholme were two giants who together made history in the sphere of Conveyancing. The former we still have with us, the latter, alas! died in May, 1908. Mr. Wolstenholme's genius was used not only in the practice of his profession, but also in the wider range of creative work. To him we owe the Conveyancing Act of 1881 (44 & 45, Vict., c. 41) and the Settled Land Act of 1882 (45 & 46 Vict., c. 38). With a sense of patriotism, to which it would be hard to find an equal, he refused all fee or award for this arduous task, undertaken whilst carrying on his heavy private work. As athlete, lawyer, and legal reformer, Mr.

Wolstenhome has left a record behind him which all will acknowledge. The two senior Editors of the present edition were pupils of his, and have satisfactorily carried on the high traditions which he left behind. The ninth edition appeared some seven years ago, so there was plenty of work to be tackled and difficulties to be overcome. Legislation came thick and fast. The Married Women's Property Acts 1907 and 1908 (7 Edw. VII, c. 18, and 8 Edw VII, c. 27) and the Conveyancing Act 1911 (1 & 2 Geo. V. c. 37) are demonstrations of these facts. Although the scheme of the text in its broad outlines has been maintained, certain useful additions have been made. In the present edition the Table of Cases includes the date at which each case was decided. A new Alphabetical Table of all the Statutes referred to in the text has been incorporated in the book. New cases have been carefully noted up and inserted in their appropriate position. The whole treatise has been thoroughly overhauled and brought up to date. These facts show that nothing has been omitted to maintain the high standard of craftsmanship always associated with the name of *Wolstenholme's Conveyancing and Settled Land Acts*.

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**Fiftieth Edition.** *Every Man's Own Lawyer*. By a Barrister. London. Crosby, Lockwood & Son. 1913.

*Every Man's Own Lawyer* makes its annual bow to the world, and various points of view are again pronounced on its merits or demerits. We have never maintained any dogmatic position on the subject, recognising that for a certain class of the public it fills a need. Unless we are mistaken, a new quotation has been added at the beginning, one which fell from the lips of that well-known humorist, Judge Parry, "We are all supposed to know the Law and nobody does"—a dictum which like those which fell from another well-known humorist on the Bench cuts both ways like a two-edged sword. The year 1912 was not prolific in legislation of a reforming nature, although two important experiments were made. We refer to the National Insurance Act (1 & 2 Geo. V, c. 55) which came into effect in that year, and The Criminal Law Amendment Act 1912 (2 & 3 Geo. V, c. 20). Whether the latter experiment of giving to the police the power of arrest without a warrant will prove a success, is very open to question.

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*Leasehold Enfranchisement.* By E. A. COLLINS. London: P. S. King & Son. 1913.—Amid the hurly-burly of everyday politics,

the important question of Leasehold Enfranchisement is too often neglected in favour of reforms more glittering to the eye. That it is an important matter, and one pressing for impartial discussion, the most ardent politician could not deny. Mr. Collins is clearly in favour of it, for, although in Chapter I the case is put in support and, nominally, Chapter II is taken up with the case against, in the latter case further arguments are really given in favour of his contention. There are stated two arguments against: (A) the right of every man to do what he likes, within legal limits, with his own property; (B) the rights of intermediate leaseholders. It is a pity that Mr. Collins did not state other existing arguments, as then the case would have been stated more impartially. His suggested remedies are excellent, and would probably meet most obstacles in the way. We can thoroughly recommend this little book, as one of the best we have seen on a little known but important subject.

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*Leading Cases on Workmen's Compensation.* By G. N. W. THOMAS. London: Butterworth & Co. 1913.—Out of the many workmen's compensation cases which have been carried to the superior Courts, the Author has selected fifty-six as enunciating principles theretofore undeveloped. Each of these is prefaced by a short statement of the facts which differentiate it, and then followed by a report, verbatim as far as necessary, of the deciding judgment. The cases chosen as "leading," are all of them of some importance, and so far as they go, the book may be found useful for ready reference.

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*Questions appearing in the Bar Examinations 1905 to 1913.* By J. A. SHEARWOOD. London: Sweet & Maxwell. 1913.—This appears to be one of the best of the collections of questions set at the Bar examinations. The answers are in plain and precise language, and the useful plan is adopted of indicating the page in the established text-books at which the subject on which the question is founded is treated in full. The Author is known to be a sound lawyer, and from his experience in preparing students for law examinations every confidence may be placed in the book.

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*Justice and the Modern Law.* By EVERETT V. ABBOT. Boston and New York. Houghton Mifflin Co. 1913.—This is a philosophic treatise "intended to help on the eternal conflict between established

custom and justice," and suggestions are made of "practical methods of avoiding error and detecting sophistries in the actual treatment of legal problems." The work gives evidence of a great deal of thought and of careful preparation.

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*Papers set at the Law Special Examinations of Cambridge University, 1907 - 1911.* Cambridge. The University Press. 1913.--The actual questions are given, of course without answers, and without comment. But they will be of great value to anyone who will work out the solutions.

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**Second Edition.** *The Outlines of Procedure in an Action in the King's Bench Division.* By A. M. WILSHERE, M.A., LL.B. London: Sweet & Maxwell. 1913.--This little work will prove of great use not only to students but, in the hands of a practitioner, will serve as a very practical key to the Rules of Court In the present edition a chapter on Evidence is omitted, and rightly so, as a subject of that importance could not have adequate justice done to it within the narrow limits at the disposal of the learned Author. There is no Index, but in its place appears a Table of Contents, setting out very fully the subject matter of each chapter. We are not convinced that this is an absolutely commendable novelty, but as the book has rapidly gone through one edition, it appears to suit the taste of its readers

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**Second Edition.** *Konstam's Rates and Taxes.* By H. R. WARD. London: Butterworth & Co. 1913.--Rates and Taxes were always a subject as full, nearly, of difficulty to the reader and practitioner as they were of pain and alarm to the sufferer under their imposts. But, leaving the pain out of measurement, the difficulty has in quite recent years increased in an enormous degree. This volume forms a quite useful handbook to the subject, and appropriately styles itself "a practical guide" By it, without severe application, a good comprehension of the burdens can be attained; and it would form a safe and sufficient preliminary to a study of the standard treatises.

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**Fifth Edition.** *Slater's Law of Arbitration and Awards.* By A. CREW. London: Stevens & Haynes. 1913.--The new edition

of this manual has, while maintaining the established form, been revised in the text and has included in it the decisions that have been come to on the subject since the date of the previous issue. The book is prepared chiefly for commercial men, and for student accountants preparing for examination in their profession; and it has every appearance of being well adapted to its purpose. The sets given of examination questions taken from those of the Institute of Chartered Accountants, the Society of Auditors and Accountants, and other such associations, afford a good range to enable the reader to test his knowledge of arbitration.

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Books received, reviews of which have been held over owing to want of space. —Bennett's *The Laws against Nonconformity*; Wertheimer's *Law of Clubs*; Thwaite's *Guide to Equity*; Lloyd's *Copyhold Enfranchisement*, Mead and Bodkin's *Criminal Law Amendment Act*, Salmond's *Jurisprudence*, Watson's *Law of Cheques*; Jacob's *Bills of Exchange, &c.*; Greenwood's *Law of Trade Unions, Supplement*, Earl Loreburn's *Capture at Sea*, Tod's *International Arbitration amongst the Greeks*, Heisler's *Federal Incorporation*; Gest's *The Lawyer in Literature*, Browne and Watts' *Law of Divorce*; *Selden Society's Publications, Vol. 29*; Ames' *Lectures on Legal History*, Farrer's *Law relating to Prospectuses*

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Other Publications received —Bohlen's *Workmen's Compensation*; Randolph's *Judicial Recall*, Conant's *International Law of Bills and Checks*, (Law Association of Philadelphia); *Encyclopaedia of the Laws of England, Supplement to the end of 1912*. Falco's *Il Concetto Giuridico di Separazione della Chiesa dallo Stato*; Tryon's *A Permanent Court of International Justice*; (Massachusetts Peace Society); Dewhurst's *Wanted A Ministry of Fine Art*, Schoenborn's *Handbuch des Volkerrechts*; Borchard's *Contractual Claims in International Law*; Lien's *Privileges and Immunities of Citizens of the U.S.*, Rubinsten's *The Land Transfer "Scandal"*, Cosentini's *La Réforme de la Législation Civile*; Talbot's *Initiative and Referendum in State Legislation*.

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The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Juridical Review*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Law Students' Journal*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer* (India), *South African Law Journal*.

THE
# LAW MAGAZINE AND REVIEW.

No. CCCLXX.—November, 1913.

## I.—IN MEMORIAM:

### (1) The Right Hon. Lord Ashbourne.

THE death of Lord Ashbourne, though he had for upwards of seven years ceased to be the official head of the Legal Profession in Ireland, has been mourned with deep regret in legal circles. In the period since his first retirement he maintained, as he had done in the intervals which separated his three Chancellorships, his kindly interest not only in the welfare of those who had served under him, but also in the aspirations and reputations of those who were engaged in the more strenuous fields of professional work. His pride in his connection with the profession was unabated. He continued actively to support and encourage the various associations, charitable and otherwise, in which barristers and solicitors are interested. Hence it happens that in mourning Lord Ashbourne's death, the Legal Profession feels that it is mourning the loss of one who had not merely occupied its foremost position with rare distinction, and for a longer time than most of his predecessors, but had also continued its friend and benefactor to the end.

Edward Gibson was the second son of Mr. William Gibson, a solicitor who was for a long period on the Council of the Incorporated Law Society of Ireland, and

was afterwards (1866) appointed a Taxing Master in the Irish Court of Chancery. The future Lord Chancellor entered Trinity College, Dublin, in 1854. He distinguished himself by obtaining in 1856 three times first of the first honours in Logics and History, and in 1857 at his degree examination the first Senior Moderatorship in Modern History, Political Science, and English Literature. He was an active member of the College Historical Society and a frequent speaker at its meetings. He served as Honorary Treasurer of the Society in 1857, and was elected its Auditor in 1858. He won the Society's three medals for Oratory, History and Composition—a feat in which he was anticipated by William Conyngham Plunket, but which has been rarely repeated since. The friendships formed by him in this Society afterwards stood him in good stead at an important juncture in his career when he sought the suffrages of the University Electors. Lord Ashbourne had always the kindliest feelings towards the Society: he took a lively interest in its prosperity: frequently spoke at its Annual Meetings, and ultimately in 1883 became its President in succession to the Right Honourable Sir Joseph Napier—a position which he filled until his death.

Edward Gibson was called to the Irish Bar in 1860. He joined the Leinster Circuit and quickly acquired a considerable practice. In 1872 he took silk. Events were now occurring which gave him an opportunity of entering the political world. The Irish Church was disestablished by an Act passed in 1869, and in 1871 resumed her independence. Ever since, the Church has been governed by her own Synods which consist of representatives both clerical and lay. Edward Gibson was elected one of the lay representatives in the Dublin Diocesan Synod of 1873, and his services in helping to shape the legal and financial departments of the Church were at once recognised by many of the leading clerical and lay representatives, while the meetings

of the Synod gave everyone an opportunity of observing his tact and ability in debate.

In January, 1875, the Right Honourable J. T. Ball, the Conservative Attorney-General for Ireland was appointed Lord Chancellor, and a vacancy was thus caused in the representation of Dublin University. Three candidates entered the field—Dr. Traill, then one of the Junior Fellows, now Provost of Trinity College, Edward Gibson, and Alexander E. Miller. The University has nearly always been represented by practising barristers, but this monopoly has at times been challenged. Dr. Traill came forward partly relying on his academic standing, and partly on the Medical Profession. The other two candidates were both barristers, but with very different claims. Miller was a Dublin graduate who had adopted London as his residence and was in practice at the English Bar; and his claim was that his residence in London would enable him to look more closely after the interests of the University in Parliament. His friends also pointed to his distinguished career in the University where, after numerous undergraduate distinctions, he obtained the highest combination of honours that were ever conferred on a student at his Degree examination. Gibson relied on the Irish Bar and the clergy of the Irish Church as his main supporters. The Bar knew him: many of the clergy had known him of old in college, others were satisfied with what they had seen or heard of him in the Synod. His old friends in the Historical Society rallied round him and worked for him. The result was that Gibson was returned at the head of the poll, having secured nearly one-half of the total number of votes.

Throughout this election the bearing of the successful candidate won the applause even of those who did not vote for him. His speeches delivered at the nomination and after the declaration of the poll are marked no less by the courtesy and generosity with which he spoke of his opponents

than by the force with which he put forward his own claims. In one of these speeches he publicly avowed his feelings towards the Profession he had adopted: "The proudest circumstance of my life is that I have the honour to be enrolled in the distinguished ranks of the Irish Bar."

The new member threw himself with great zeal into Parliamentary life. As a private member, acting on behalf of the Incorporated Law Society, he introduced and secured the enactment of the Legal Practitioners (Ireland) Act in 1876. In 1877 he was appointed Attorney-General, and in that capacity had charge of the Irish Judicature Act in the House of Commons. The Conservatives went out of office in 1880, and he was again a private member. But he scarcely slackened his attendance in the House, so that during the Liberal Administration he became one of the foremost members of the Opposition.

In 1885, when the Conservative Party returned to office, Edward Gibson was raised to the Upper House with the title of Baron Ashbourne and was made Lord Chancellor of Ireland with a seat in the Cabinet. He resigned when the Conservatives went out of office in the Spring of 1886, and was reappointed on their return in Trinity Term of the same year. He resigned again in 1892 and was reappointed in 1895. His final retirement was in 1905.

In Ireland the Lord Chancellor usually presides in the Court of Appeal, but sits alone (on Saturdays as a rule) to dispose of lunacy and minor matters. The full Court of Appeal consists of the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the Lord Chief Baron, and the Lords Justices; but as the other members of the Court are usually engaged elsewhere, the Lord Chancellor generally sits with the Lords Justices only, and as a rule, all ordinary appeals are heard by the Court so constituted, and it is only on special occasions, in cases involving important issues or novel points, that the Court is strengthened

by bringing in other judges. Thus the Court over which Lord Ashbourne presided during his first two Chancellorships on ordinary occasions consisted of himself, his old college friend Lord Justice Fitzgibbon, and Lord Justice Barry; and during his third Chancellorship he had the assistance of Lord Justice Fitzgibbon, Lord Justice Walker (who had been, and afterwards again became Lord Chancellor), and Lord Justice Holmes. The Court was peculiarly well constituted. The dignity of the Chancellor's manner in presiding, and his unfailing courtesy increased the sense of responsibility in those whose duty and privilege it was, by their arguments, to assist the Court in its deliberations, and helped them to put forward their best efforts: his knowledge of men and affairs acquired in the wider world in which he had lived supplemented the longer judicial experience of his learned colleagues. Thus, owing to the happy combination of gifts possessed by the members of the Court, its reputation was never higher than during the years Lord Ashbourne was Lord Chancellor.

But it was perhaps when he sat alone—in lunacy and minor matters—that Lord Ashbourne's talents were seen at their best. His rare knowledge of human nature enabled him to judge of motives and character, while his tact removed heart-burnings and soothed family jealousies with wise conciliatory words. On these occasions Lord Ashbourne made one thing conspicuous, namely, that in administering these two Departments, the only matter the Court had to consider was, what was for the benefit of the subject of its jurisdiction. To ascertain this, and when it was ascertained to carry it out, he spared himself no pains.

Nor did his care for the subjects of his special jurisdiction end with deciding questions coming before him in Court. It is well known that he made it his duty personally to visit the Lunatic Asylums in Ireland when

opportunity and time permitted; and when making such a visit he did not confine his attention to such lunatics as were under his more express control, but made it his business to go through the whole asylum, and see all the arrangements, and speak to everyone in the place. As a result of these visits he was enabled to take steps for improving the comfort of some patients, and even for securing the release of a few.

An improvement in the Lunacy Jurisdiction made by 1 Edw. VII, c. 17, is due to his suggestion. In pursuance of this Act, the Letter under the Sign Manual in Ireland is now directed to the Master of the Rolls and the Lords Justices as well as to the Lord Chancellor, with the object of enabling the Lord Chancellor to obtain the assistance of these other Judges in cases of difficulty—a matter of considerable importance, as in lunacy matters the appeal lies not to the Court of Appeal but only to the King in Council.

Nor was it only judicial and administrative matters which claimed the attention of the Lord Chancellor. The policy of transferring the ownership of land in Ireland to the occupying tenants was first successfully launched by the Land Purchase Act of 1885; with the framing of this Act he was so intimately connected, that it is popularly known as "Lord Ashbourne's Act." The success of this Statute led to further enactments facilitating Land Purchase, which followed one another in such quick succession that from 1885 to 1903 there were passed no fewer than eight Land Purchase Acts. The burden of framing and introducing this legislation largely devolved upon the Lord Chancellor, and required his frequent attendance in London as a member of the Cabinet and in the House of Lords. Yet such was his industry and his capacity for work that it frequently happened that he was engaged in the House of Lords one day and sat in the Court of Appeal in Dublin on the

following day. Indeed, while Parliament was sitting there was no more frequent passenger on the cross-channel steamers than the Lord Chancellor of Ireland.

After he was raised to the Bench, Lord Ashbourne maintained his old regard for the Irish Bar: he guarded its privileges and preserved its traditions: he generously supported its Benevolent Society, whose efforts he encouraged by his presence at its annual meetings. Even when his official connection with the Bar had determined, he lost no opportunity of inquiring as to the prospects and success of those amongst its members whom he had met in the practice of their profession.

The interests of the Solicitors' Profession also always had his sympathy. It has already been mentioned that his first venture in the paths of legislation was undertaken at the request of the Incorporated Law Society. When he became Lord Chancellor he supported other legislation promoted by the same Society. It was with his assistance that its president was by Statute made a member of the Rule-Making Authority of the Supreme Court. The Bill promoted by the Law Society for Regulating the Solicitors' Profession, which was passed into law in 1898, had his active support. He was a generous contributor to, and an active patron of, the Solicitors' Benevolent Society and the Irish Law Clerks' Benefit Society. The friendly relations existing between the Chancellor and the Council of the Law Society were evidenced by the fact that invariably during his tenure of office he was an honoured guest at the Annual Dinners of the Society. On his retirement in 1905 his portrait (by C. Russell) was presented by some members of the profession to the Society, and now hangs in their Hall at the Four Courts.

By his devotion to his work in every department of his great office and his unwearied industry, Lord Ashbourne set a high standard for every official who served under him. On

the Bench his impartiality was conspicuous: his demeanour when discussing questions in which warm feelings are apt to be aroused, was beyond praise. A great judge and administrator, he has by his conduct given an example which it will be hard to surpass. Loyal to his friends, and generous towards those who differed from him, he has left none but pleasant memories behind.

G. Y. D.

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## (2) Frederick William Maitland.

May 28, 1850—Dec. 19, 1906.

Of ordinary men the final words may be spoken by their contemporaries. Of the very great man no final word can be spoken until the age in which he lived has passed into history. His contemporaries can collect his scattered writings and recall his memorable sayings; they can preserve all those characteristic traits which make up his personality; and they can in this way make it easier for posterity to picture the man whom it recognises as one of the factors which has helped to make its world. But that is all. That Maitland was, in the sphere of English law, one of these very great men would, I think, be admitted by all who have learned from his books, and attempted to travel along those paths which he both constructed and illuminated. And, if that is the case, I cannot but feel that I am less fitted than many others to write about him and his work. I never saw his face. Two very kind and encouraging letters were all the personal intercourse I ever had with him. It is true that his style of writing often allows the reader to catch glimpses of the working of his mind, and so gives him the impression that he is listening to the witty conversation of a very human and a very learned friend. But the testimony of many witnesses shows that no amount of diligent reading

of his books can give the impression which he made upon those who were privileged to know and speak with him. "It is impossible for me," said Professor J. C. Gray, "to write or think of Maitland without recalling his personal charm. How great that was! I never saw him but once. But to have broken bread at his house among the Cotswold Hills will always be one of the happiest of my memories. If I said what I felt you would understand it, but to one who had not known him it would seem extravagant."[1] But though I speak without the advantages possessed by many contemporaries, and without those opportunities for estimating the full influence of his work which can only belong to posterity, I felt that I should be the ungrateful pupil of a great master if I did not, when asked, attempt to say something of the great work which he has done both for English law and English history.

I shall not attempt to deal with the facts of his life, as they have been adequately recorded by Mr. Fisher.[2] Nor shall I attempt to enumerate the works which he wrote—a marvellous output for one who, in his later years, was always suffering—as they have been admirably calendared by Mr. A. L. Smith,[3] I shall only attempt to say something of the intellectual characteristics and mental outlook which determined the direction of his life's work; of the literary qualities of that work, which helped to make it so extraordinarily effective; and of the influence which his work has had, and may be expected to have, upon English law and history.

First and foremost Maitland was a lawyer. Mr. B. B. Rogers, in whose chambers he read, says, "He had not been with me a week before I found that I had in my chambers such a lawyer as I had never met before. . . .

[1] *L. Q. R.*, XXIII, 138.

[2] *Frederick William Maitland: A Biographical Sketch.*

[3] *Ibid.*, *Two Lectures and a Bibliography.*

His opinions, had he suddenly been made a judge, would have been an honour to the Bench."[1] After he had left the Bar he used his practical knowledge of law and conveyancing to serve the interests of his college and his university; and in all his work on legal history we can see that his training in chambers and in the Courts gives both an air of reality to his descriptions of the manner of life and thought of the remote ancestors of his contemporaries at the Bar and on the Bench, and a sureness of touch in his interpretation of mediæval doctrine and in his criticism of mediæval documents, which could never have been learned from books. Dr. Hazeltine says of Selden, "Undoubtedly his activities as a conveyancer, as an advocate at the Bar, and as a lawyer Member of Parliament, largely developed those capacities for accurate definition and statement, for clear and subtle analysis, for sound legal reasoning, and for judicial sifting and use of evidence, which we discern in his writings"[2]; we see exactly the same characteristics in Maitland's work, and for the same reasons. But, unlike most practising barristers, he was not content to be, as Sir F. Pollock puts it,[3] merely "a sound lawyer with scholarly tastes." His was a mind which would take nothing for granted, which was driven to analyse the causes and effects of all the legal rules and institutions, and all the political and social phenomena with which he was conversant. Naturally he turned to history. In history alone could be found the explanations which he sought. History alone could show what was the original form of these legal rules and institutions, what sphere of usefulness they had once filled, whether they still performed any useful functions, and, if they did, whether by judicious change, they could be fitted to perform them better. While still a practising barrister he had been greatly impressed by

[1] Fisher, 15, 16. [2] *Harv. Law Rev.*, XXIV, 207.
[3] *Quarterly Review*, Vol. CCVI, 406.

Stubbs' constitutional history which he had read "because it was interesting"; and he so admired Savigny's *Geschichte des Römischen Rechts* that he began to translate it.

A sound lawyer, equipped with philosophy and history, and willing to use his philosophical and historical learning to criticize the technical rules of which he is a master, will produce some surprising results. The paper which he contributed in 1879 to the *Westminster Review* on the Law of Real Property showed that a new and peculiar star had arisen in the English legal firmament.[1] His use of Brunner's researches into the history of the English law of inheritance, to demonstrate that our division of property into realty and personalty was a relic of ancient barbarism, working mischief and injustice, which all other civilised peoples had long ago abandoned, showed what philosophy and history united to a technical mastery of legal rules could do for the cause of law reform. Long ago Bentham had wished to abandon the heir-at-law to the Society of Antiquaries. Maitland wittily suggested a more suitably historic hereafter. He was to be consigned to the "Gradualisten" and "Parentalisten" schools "who shall write monographs upon him to the end of time."

This paper marks an epoch in the development of legal thought. Most of the law reforms of the century had, up to that date, been inspired by lawyers of the school of Bentham. Their simple faith in *à priori* principles had accomplished much in an age in which the legal system was in danger of being choked by the accumulated rubbish of centuries. But it could not accomplish all that they had hoped. It was a faith born of inexperience; and a larger knowledge of the complexity of human nature, of social problems, and of the technical legal rules which successive ages had invented to solve these problems, had somewhat dimmed it. Writers of the school of Maine were demon-

[1] *Collected Papers*, I, 162—201.

strating that many of these principles were based upon a very superficial view of human nature; that they could not explain all existing rules even at the present day; that they did not even exist in the past. But the writings of the historical school generally stopped short at explanation, they showed how existing legal rules came to be what they are. They showed that even the most unreasonable of them once had a reasonable basis and that some still had more reason than whole-hearted followers of Bentham's principles might allow. But that was all. Maitland's paper showed how history in the hands of a first-rate lawyer and philosopher could suggest practical proposals for law reforms based not only upon a knowledge of existing law, but also upon a knowledge of the ideas which had created it. It showed that a knowledge of legal antiquities could be used, not only to teach old law and to explain present law, but also to suggest the changes needed to bring the present law into harmony with its modern environment.

And this was not all. Maitland's habit of analysing existing legal rules and institutions in the light of their history enabled him to throw new light not only on some of the most technical and difficult, but also on some of the most ordinary and familiar features of our legal landscape. His critical mind was never dulled by familiarity. It was just these familiar things, which are generally accepted without comment and without explanation, that aroused him to investigate. And thus he gave us an explanation of the relation of equity to law, and an exposition of the great part which the Trust has played in our English life, which are as obviously true as they are strikingly original.

In 1884 Maitland abandoned the Bar, and became Reader in English law at Cambridge. It was during the course of this year that he made the acquaintance of Professor Vinogradoff and learned from him something of the wealth of unedited material for the making of legal history to be

found in the Record Office.[1] "His vivid mind," says Mr. Fisher, "was instantly made up: on the following day he . . . drove to the Record Office, and being a Gloucestershire man and the inheritor of some pleasant acres in that fruitful shire, asked for the earliest plea roll of the County of Gloucester. He was supplied with a roll for the year 1221, and without any formal training in palæography proceeded to puzzle it out and to transcribe it."[2] The result was the volume of *Pleas of the Crown for the County of Gloucestershire* which appeared in the course of that year. It marked the beginning of his life work on English legal history, and made, as Mr. Fisher has said, an epoch in the history of history. It showed lawyers and historians what could be learned from a set of Records which had only been very occasionally used to illustrate isolated points in legal history, which no one before had ever dreamed of using systematically as primary authorities for the social and constitutional history of England.

Maitland soon showed that he was even greater as an historian than as a lawyer or a philosopher. Passing over many lesser works, we have his edition of *Bracton's Note-Book*, his work as Literary Director of the Selden Society, his articles on Seisin, and on the history of the *Register of Writs*, and then the great *History of English Law*. Then came a series of monographs on many cognate topics dealt with in that history:—*Domesday Book and Beyond; Canon Law in the Church of England;* his great work on the *Year Books;* his works on the problem of corporate personality—the lectures on Township and Borough, the translation and introduction to a chapter of Gierke's great work on *Political Theories of the Middle Age*, the illuminating paper on Corporation and Trust; and his two excursions into the sixteenth-century history—the Rede lecture on English law

[1] See Professor Vinogradoff's Paper in the *English Historical Review*, XXII, 280, 281.

[2] Fisher, 25.

and the Renaissance, and his contribution to the *Cambridge Modern History*. Chief Baron Hale—the earliest historian of our Common law—once said: "That the law will admit of no rival nothing to go even with it." And so Maitland found. As his health declined and it become clear that his days were numbered, he devoted all his great powers to the history of English law. "Knowing the thing which he could do best, and judging that it was worthy of a life, he stripped himself of all superfluous tastes and inclinations that his whole time and strength might be dedicated to the work. Even music had to give way.[1]

He would have made a great judge. The logical clearness of his mind, his powers of lucid exposition, his powers of focussing the results of an argument into a pointed epigram, remind us of some of the judgments of Lord Macnaghten. But as he himself said in 1888, in his inaugural lecture as Downing Professor of the Laws of England: "Great historians are at least as rare as great lawyers." That he was the greatest historian of our law that had yet appeared in all the centuries of its growth, is an obvious truism. That he was one of the greatest of all our English historians would probably not be disputed by many, and will become more and more apparent in the succeeding years. What, then, were the qualities of the mind of the man of whom these things can be said?

The historical is sometimes contrasted with the analytic temperament—the mind which desires to know how a given phenomenon has originated, with the mind which desires to explain the principles underlying the actual existing phenomenon. But in truth the great historian must have something of the analytic faculty, and he who would analyse must have the help of history if he would fully understand the thing to be analysed. Thus the historian

[1] Fisher, 178.

who wishes to trace the origin of some old rule of law or legal institution, must know something of its shape and content at the present day. If he does not know these things, he will not know what are the victorious elements which he must disengage from the tangle of conflicting forces and tendencies which he will observe in the far-off days when the rule of law or legal institution was born. To tell the tale of rules which never survived, of tendencies which were never realised, of institutions which failed, is mere antiquarianism. Effective legal history is the history of rules and tendencies and institutions which have survived because they were the fittest. But that necessarily involves a knowledge of what has survived. It necessarily involves a certain amount of reasoning from the established modern rule or institution to its unknown origin. Maitland, because he was a trained lawyer, was well fitted to pursue this line of reasoning with triumphant success. His *Domesday Book and Beyond*, and his introduction to the *Select Pleas in Manorial Courts* are two out of many examples. After reading these books we feel that we have arrived at some conclusion—perhaps a negative conclusion, but still a conclusion. There are books, and learned books too, in which the author or authors seem to have been researching, so to speak, at large. Facts are carefully grouped, statistics are carefully compiled, theories are suggested, and carefully weighed. But at the end we are left much where we started. To the obscurity of the original authorities the obscurity of a careful and elaborate commentary has been added.

It is exactly this sort of obscurity that a trained lawyer will avoid. If he has ever drawn pleadings he will have got into the habit of formulating an issue. And this habit, if he ever comes to write legal history, will be invaluable. There is a rule of law to be explained. We know that it had in its mature form certain characteristics. We see in the

indefinite past certain causes which might produce them. We see other causes which would have given the rule a different turn. There is a clear issue—why did the one set of causes prevail over the other set? In answering that question we explain the rule in such a way that we see its connection with phenomena of social, political, or economic history, and restore the life that once existed behind the technical form. Thus technical forms are made to yield an instructive commentary upon the evolution of the social, political, and economic ideas which gave them birth. Legal history ceases to be merely the tale of the evolution of technical rules, and becomes a living history of the evolution of the nation's ideas upon all those matters which it considers to be of sufficient importance to be settled by the State. It is largely because Maitland treated legal history in this way that he made it a subject of such absorbing interest. He taught a lesson to succeeding historians of our law which can never be forgotten. What Coke said of Littleton we can say of him—"By this excellent work he faithfully taught all professors of the law in succeeding ages."

This power of formulating clearly the various problems which arise in the course of tracing the history of any given legal rule or institution, enables an historian to know exactly what is the information he requires; and this knowledge is all important in a country where the wealth of unpublished original authority is overwhelming. It enables him to recognise the decisive authorities when he sees them. It enables him to emphasise the parts of those authorities which really count. Maitland was a great discoverer because he knew what to look for, and could recognise it when he found it. It was this faculty which made him the real founder of the Selden Society. He was a "Literary Director" in the very largest sense of which those words are capable. He set an example to his successors to that office. All of us who have at heart

the cause of English legal history, hope and expect that the following of that example will establish a tradition.

But this method, though essential to the clear statement of the evolution of many points of legal doctrine, is sometimes dangerous. In the first place, because it involves the reading of history backwards, it is possible that we may read into the period which we are reaching in our backward career the ideas of the period which we are leaving. Some of Maitland's attempts to break up the primitive communities of the earliest period of our history into individual atoms, are based upon an analysis of the ideas of the thirteenth rather than of the tenth century. In the second place it may lead us to start with a theory, and, having so started, to attach an undue importance to those parts of our authorities which support it; and this is a very subtle form of error, because it is possible to fall into it quite unconsciously. It is perhaps arguable that Maitland, in his Rede lectures on English law and the Renaissance, exaggerated the danger of the Common law. That its supremacy was in danger I think he proves—but hardly that its existence was seriously imperilled. Again it might be said that, though all that he says in his book on *Bracton and Azo* as to Bracton's ignorance of large parts of Roman law is fully proved, too little account is taken of Bracton's use of other parts of Roman law—notably the law as to *dominium* and *possessio*—to which there existed more abundant parallels in the already ascertained rules of English law. But these are all very disputable points. What is not disputable is the freedom of Maitland's work from such errors. "Forewarned is forearmed." He was fully aware of these dangers as his paper on the Survival of Archaic Communities[1] shows. All teachers of early law and early institutions should put that paper into the hands of their students, because it affords one or two striking object lessons of some of the

[1] *Collected Papers*, II, 313—365.

dangers incident to the use of this very necessary expedient, of arguing from what is known at a later date to what may be expected to have existed at an earlier date.

The skill with which Maitland avoided the dangers of this method of inquiry is, I think, mainly due to three very striking characteristics of his mind. In the first place, none but the very best evidence would ever satisfy him. It was this characteristic which led him to turn from the task of continuing the history of English law to the task of making a critical edition of the earlier *Year Books*. Such an edition was in his eyes a necessary preliminary to the continuation of the history. It was this characteristic which led him to make, as a preliminary condition of fully understanding these *Year Books*, so learned a grammar of the French talked in the law Courts in the fourteenth century, that M. Paul Meyer recommended it as a text-book to students of mediæval French. In the second place, he had what we may call a concrete mind. It is easy when writing of the history of legal theory to state a doctrine and its evolution in general terms, citing perhaps a sentence or two which seems to illustrate the general statement. But will the statement bear the test of application to a concrete case? If it will not, it is clearly wrong or obscure. The most superficial study of Maitland's books shows that he always applied this test to his statements. In a letter which he wrote to me he said:—"People can't understand old law unless you give a few concrete illustrations: at least I can't." In the third place, he is always alive to the human aspect of history. It is very easy when dealing with theories, and doctrines and institutions, to forget that they were made and used, and developed and abused, by men of like passions with ourselves. Maitland never forgot this. He can extract human traits from a plea roll, and in his hands *Year Books* become human documents. He even invested his discussion on the Hide with some human

interest, when he thus pictured one of the causes of "the phenomenon which has aptly been called beneficial hidation"[1]: "Long ago the prevailing idea may have been that team-land, house-land, pound-land and fiscal hide, were or ought normally to be all one; and then the discovery that there are wide tracts in which the worth of an average team-land is much less or somewhat greater than a pound may have come in as a disturbing and differentiating force, and awakened debates in the council of the nation. We may, if we like such excursions, fancy the conservatives arguing for the good old rule 'One team-land one hide,' while a party of financial reformers has raised the cry, 'One pound, one hide.' Then 'pressure was brought to bear in influential quarters,' and in favour of their own districts the witan in their moots jobbed and jerry-mandered and rolled the friendly log, for all the world as if they had been mere modern politicians."[2] In both these last two points—in his love for the concrete and his sense of the presence of an all-pervading similar human nature—he resembles Walter Bagshot. These characteristics enabled both men to render ordinarily dull topics interesting, to give convincing explanations of abstract doctrines and tendencies, and to picture the characters and motives of men with wonderful skill and freshness.

Closely allied to this last characteristic of Maitland's mind is his sense of humour and his constant gaiety. His sense of humour and his keen scent for the human lead him to illustrate the institutions of the past by parallels from the present that, to use an hackneyed expression, both amuse and instruct. The quotation which I have just made from his discussion of the hide in *Domesday Book and Beyond* is as good an illustration as any. Innumerable instances could be gathered from almost any of his books. And this humour is never anything but kindly. It goes hand in hand with a

[1] *Domesday Book and Beyond*, 448. [2] *Ibid.* 470, 471.

gaiety of manner which seems to make light of difficulties, and often conceals the learning and research which underlie the brilliant argument that flows so easily. Finally, to this humour and gaiety there is added a talent for the epigram which clinches an argument, and sums up in some memorable phrase the conclusion of the whole matter.

The style was characteristic of the man; but the charm of the man was greater even than the charm of his style. His eye was always open to the good points of a piece of work. He was ever ready to assist and encourage. His passion for truth, says Mr. Fisher,[1] was so intense and disinterested, "that he would speak with genuine enthusiasm of such criticisms of his own work as he judged to be well founded and to constitute a positive addition to knowledge." Such a man was necessarily not only a great historian but a great teacher. Mr. Chaytor and Mr. Whittaker, in their preface to his lectures on Equity, say: "Those who have heard them delivered—amongst whom we are—with all Maitland's gaiety and with all his charm of manner and his power of making dry bones live will not easily forget either the lectures or the lecturer. Equity, in our minds a formless mystery, became intelligible and interesting; and as for the lecturer, well, there were few things that his hearers would not have done or attempted to please F. W. Maitland." And his pupils were not only those who were privileged to attend his lecture room. Many readers of his books have been induced by them to interest themselves in the topics in which he was interested, and so to become his pupils in a very real and practical sense. What other writer on the personality of the corporation could have inspired so much literature on a set of problems very remote from those which usually appeal to the mind of English lawyers? Probably it is not too much to say that the charm of his style will for many a year be a valuable asset to the cause of legal history.

[1] Fisher, 177.

It will do much to convince lawyers that it is both necessary and interesting.

What will be the influence of this great lawyer, historian and teacher, upon the study of law and history? It is too soon to judge yet. But it seems to me that in three directions his influence will probably be both far reaching and permanent.

Firstly, he has taught us to apply the methods of historical criticism to the sources of English law. We know now something of the influences under which Bracton wrote. We know infinitely more than we did before of the real nature of the *Year Books*. From his various works we get many hints as to the point of view from which we should look at many other writers upon and sources of English law. It is good for a legal system to be taught occasionally to look at its authorities in a new light, because it tends to substitute for a blind adherence to their letter a real understanding of their spirit. What the school of the humanist lawyers of the sixteenth century did for the study of Roman law, Maitland began to do for the study of English law. May there be found many successors to continue this work!

Secondly, he has taught English lawyers to look at their system in its relation to other systems of law. History, as he said, involves comparison. We understand the strength and the weakness of our own system the better for such a comparison. We see better where it is at fault. We are able to appreciate or criticise intelligently suggested reforms. And at the present day, when physical science is diminishing the size of the world, and nations are losing their former isolation, such knowledge is essential. It enables us to learn from the success or failure of the legislative experiments of other nations. "The system of law under which we live, its merits and defects, its relations to other living systems, these are themes which—so I imagine—might and ought to have a place in a scheme of social and political education."

His article on the making of the German civil code,[1] which begins with these words, shows how he would employ the comparative method, not only to elucidate legal history, but also to improve modern law. As Professor Saleilles has said:[2] "*Une ère nouvelle de rapprochement s'ouvra pour cette vaste communauté juridique que fut jadis l'Europe civilisée au moyen âge, et qu'elle redeviendra encore sous la pression des besoins économiques et civilisateurs de l'époque moderne. Si cette pénétration se réalise jamais, des hommes comme Maitland en auront été les premiers et nobles ouvriers.*"

Thirdly, he has renewed that partnership between the history of English law and the general history of England, which once existed in the days of Lambard, Bacon, Selden, Spelman, Prynne, and Madox, but had, in more recent times, been almost dissolved. For the future we hope and expect they will begin again to carry on their business in common with a view to their mutual profit. Together they can accomplish much that neither can accomplish alone. It is obvious, on the one hand, that a knowledge of legal history is essential to the proper understanding of all branches of English history—political, constitutional, economic, or social. Law at all periods of our history is intimately related to all sides of the national life; and the enactments of the Legislature, and the decisions of the Courts, represent the considered judgments of the nation upon an infinite number of various human activities. It is obvious, on the other hand, that the reason which gives life to statutes and decisions cannot be grasped unless we know the ideas at the back of the minds of those who made them; and these ideas it is impossible to understand without some knowledge of the general history of the period when they were made. But, till Maitland pointed the way to re-union, law and history had too long remained in a state of unprofitable isolation. The lawyer,

[1] *Collected Papers*, III, 474—488. [2] L. Q. R., XXIII, 141.

immersed in technical rules, forgot the human beings for whom those rules were made and the human needs which gave them birth. The historian, because he was ignorant of the meaning of these technical rules, was apt to misapprehend the meaning of statutes and the reasoning of the Courts. Maitland showed how history can humanise law, and how law can correct history. He was a consummate lawyer; but he never forgot the human beings who made and worked the institutions, or the human needs which shaped the laws, which he was describing. Under his hands even the most technical rules became living things—the expression of human policy or logic, of human passions or ideals.

W. S. HOLDSWORTH.

## II.—FREEDOM OF CONTRACT.

(*Continued from Vol. XXXVIII, page* 413.)

DIVISION (4), viz., contracts made void by statute with a view to public policy, may seem *primâ facie* to be far more extensive than the residuum of void agreements which is still left to be considered. It is generally called "contracts void (or illegal) by statute" or "contracts made in breach of a statute." Apparently this might include either (α) agreements made with a view to committing a statutory felony or misdemeanour, or (β) agreements which indirectly involve the commission of a statutory felony or misdemeanour, or (γ) agreements the mere making of which is itself a statutory felony or misdemeanour, or lastly (δ) agreements which the Parliament has merely relieved the Courts from the obligation of enforcing. It is obvious that (α), (β), and (γ) really belong to Division (1), *i.e.*, contracts absolutely illegal, viz., agreements for committing or furthering a crime

or civil injury; and that Division (1) includes (α), (β), and (γ), and not much else, because by this time nearly the whole of the Criminal law is statutory.

In order to avoid overlapping, let us confine Division (4) to (δ), viz., those agreements which Acts of Parliament have merely withdrawn from the jurisdiction of the Courts and refused to allow the Courts to be used for enforcing.

Even so, it is difficult to avoid some confusion and overlapping: for there are some statutes which positively prohibit certain forms of contract, viz., such statutes as the Lottery Act 1698 (10 Will. III, c. 17), and the Gaming Act 1802 (42 Geo. III, c. 119), and the Lotteries Act 1823 (4 Geo. IV, c. 60): there are some statutes which both prohibit certain contracts on pain of a penalty and also contain a clause declaring them void, viz., the Act of 1664 (16 Car. II, c. 7), to restrain "excessive gaming," and the Act of Anne, 1710, (9 Anne, c. 14): there are some statutes which impose a penalty on certain transactions for revenue purposes merely, but without intending to make the contract void, viz., the Excise and Licence Act (6 Geo. IV, c. 81): lastly, there are some statutes which merely make certain contracts void, but without imposing any penalty whatever, or conveying any actual prohibition, viz., the Gaming Act 1845 (8 & 9 Vict., c. 109). It is with these last that we are here principally concerned, and with the others so far only as they provide for the *avoidance* of contracts.

The Act (16 Car. II, c. 7) enacted that if anyone lost (at once) anything exceeding £100 in playing at or betting on *any game or pastime*, the agreement to pay was void, and any security for payment was void: the Act also imposed penalties. This Act is repealed by the Gaming Act 1845.

The Act 9 Anne, c. 14, "for the better preventing of excessive gaming" (1710), enacted that if anyone lost £10 (or over) in playing at or betting on "any game" (at once) and paid it, then he might recover the amount by action at

law brought within three months; that all securities for such money won at or on *games* should be *utterly void;* and also that all securities for money knowingly lent or advanced for such gaming or betting should be *utterly void.* The result of which was that even an innocent purchaser for value of such paper money had no remedy. Consequently, this Act of Anne was amended and partly repealed by the Gaming Acts of 1835 and 1845.

From 1710 to 1835, however, the anti-wagering legislation was principally concerned with Stock Exchange and insurance transactions. Sir John Barnard's Act 1734 (7 Geo. II, c. 8) was directed against "the infamous practice of stock-jobbing"; the sort of transactions it was intended to prohibit were mere wagers on the rise and fall of prices, disguised as purchases and re-sales to be completed at future dates, which practically amounted to agreements to pay differences. So stringent were the terms of this Act that it could not fail to interfere with genuine business transactions: at last it was repealed in 1860 (23 Vict., c. 28), since wagering contracts in general had been made void by the Act of 1845.

The Life Assurance Act 1774 (14 Geo. III, c. 48) prohibits and makes void all kinds of wagering contracts of insurance (other than marine insurance): it enacts that an insurance on the life of any person or any other event wherein the person on whose behalf the policy is effected has no interest shall be void; and that if he (the assured) has an interest in such life or other event, he shall recover from the insurer no greater sum than the value of his own interest. What amounts to an insurable interest is not specified in the Act; but anyone may have an unlimited insurable interest in his or her own life and in that of the wife or husband. In all other cases an insurable interest is only possible provided the death or other event involves the risk of pecuniary loss to the person to benefit by the insurance policy: if the amount of possible loss be limited in fact,

the amount claimable will be limited accordingly; *e.g.*, a creditor has an interest in the life of his debtor, limited to the amount of the debt; a master has an indefinite but still limited interest in the life of his servant. In *Castellain* v. *Preston*[1] it was held that a contract of fire insurance was a contract of indemnity merely. The defendant in this case had agreed to sell certain premises but not yet conveyed them, when they were damaged by fire: he then obtained £330 from the London, Liverpool and Globe Insurance Co., in which the premises were insured; and afterwards he obtained the full price, £3,100, from the purchasers (which they were bound to pay). Plaintiff (on behalf of Company) sued defendant for repayment of the £330. It was first held by the Queen's Bench Division that defendant had a right to keep the £330, but on appeal this decision was reversed by the Court of Appeal, which held that any contract of fire or marine insurance was merely a contract of indemnity, that the defendant had no right to be more than fully indemnified for the loss actually suffered by him, and that therefore the £330 must be repaid to the Company.

But in *Dalby* v. *India and London Life Insurance Co.*[2] a different rule was applied to contracts of life insurance. In this case it was held that the contract called "life assurance" was a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity during his life, the amount of the annuity being calculated in the first instance according to the probable duration of the life; so that when once fixed it is constant and invariable; and that this species of insurance in no way resembled a contract of indemnity: also that the Life Assurance Act (1774) merely required the insurer to have an interest at the

[1] [1883], 11 Q. B. D., C. A. 380.
[2] [1854], 15 C. B. 365.

time of effecting the policy, and limited the amount recoverable to the value of that interest.

The Gaming Act 1835,[1] was passed in order to amend the Act 9 Anne, c. 14, inasmuch as that Act had expressly made *utterly void* all notes, bills, bonds or other securities for money or other valuable thing which was either (α) won by playing at or betting on games, or (β) knowingly lent or advanced for such gaming or betting. The amendment consisted principally of deleting the words "utterly void" and substituting the words "deemed to be given for an illegal consideration." Previous to 1835, securities for money lost at (or on) games, or for money lent with a view to gaming or betting, were so utterly void that even an innocent purchaser for value of such security or negotiable instrument had no remedy. But by the Act of 1835 securities for money won by playing at or betting on games or knowingly lent with a view to such gaming or betting are to be deemed to have been given *for an illegal consideration*: this means that although the bond or security is void as between the original parties, and of no use to anyone who knew of its tainted origin, yet if the holder can prove himself an innocent purchaser for value, he is protected.

The Gaming Act 1845,[2] though not the last word of legislation on the subject, may be taken as the basis of the existing law as to wagering contracts in general. This Act repealed both the Act of 1664 and so much of the Act of 1710 as had not been altered by the Act of 1835; so that now nothing remains of the Acts of 1664 and 1710 except so much as is re-embodied in the Acts of 1835 and 1845.

This Act of 1845[3] enacted:—

> "That all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be *null and void*, and that no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable

[1] 5 & 6 Will. IV, c. 41. [2] 8 & 9 Vict., c. 109. [3] 8 & 9 Vict., c. 109, s. 18.

thing alleged to be won on any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: Provided always that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime or exercise."

There is still an important difference between the operations of the two Acts of 1835 and 1845. The Act of 1835 applies to money lost and won by playing at or betting on *games* and provides that all securities for such money shall be regarded as given upon an *illegal* consideration: whereas the Act of 1845 applies to wagering contracts generally, and to the contracts themselves merely, by providing that such agreements shall be null and void.

Thus there is a difference between a bet on a cricket match and a bet on the result of a contested election. As between the original parties both are equally void. And if a security be given by the loser of the bet (*e.g.*, a bill of exchange or promissory note), and this paper security come into the hands of an innocent purchaser for value, then it will be equally valid in either case, no matter whether the original wager was on a cricket match or on the result of a contested election; because, by the Act of 1835, security given for money lost on games is not utterly void, but deemed to have been upon an illegal consideration; so that if the indorsee of such paper money can show that he gave value for it and knew nothing of its tainted origin, he is entitled to sue and recover upon it.

But if the indorsee of the paper security be not an innocent purchaser for value—in other words, if either he did not give value for it or he knew of its tainted origin—then it will make a very practical difference whether the original wager was on a cricket match or on the result of a contested election. Two cases will show the separate effects

of the two Acts. In *Fitch* v. *Jones*[1] the action was brought (in the Queen's Bench) by the indorsee of a promissory note, which note had been given in payment of a bet on the amount of the hop duty. As the wager itself was simply void by the Act of 1845, and neither the wager nor the security given upon it were in any way touched by the Act of 1835, it was decided (by Lord Campbell) that the note did not take its inception in illegality within the meaning of the rule; that although the note was given to secure payment of a wagering contract, yet it was not illegal, for there was nothing prohibited about it, but it was simply void: so that the wager itself was not an illegal consideration, but the same as no consideration at all. Now, by the Common-law rule as to negotiable instruments (originating in the Law Merchant), the consideration for a negotiable instrument is presumed unless the contrary is proved: moreover, it matters not whether the consideration was given by the plaintiff himself or by a previous holder. Consequently, in *Fitch* v. *Jones*, it was held that the *onus probandi* was on the defendant, and it was for him to prove that neither the plaintiff nor the previous holder had given consideration for the note; and as the defendant could not prove this, he was held liable; it mattered not that the original consideration was a wager on the amount of the hop duty—that was void merely and not illegal: consequently no taint of illegality attached to the subsequent *presumed* consideration which the defendant could not disprove.

But the effect of the Gaming Act of 1835 may be illustrated from the case of *Woolf* v. *Hamilton*.[2] This action was upon a cheque of which the defendant was the drawer, and which had been given by him to the payee in payment of bets lost on horse races. The cheque had been indorsed by the payee to the plaintiff for value, and the plaintiff *knew*

[1] [1855], 5 E. & B. 245. [2] L. R. [1898], 2 Q. B. 338, and C. A.

for what consideration the cheque had been given when it was so indorsed to him. It was held by Darling, J., that under the Gaming Act 1835[1] the cheque must be deemed to have been given for an illegal consideration, and therefore the action was not maintainable. And this decision was upheld unanimously by the Court of Appeal. It mattered not that the plaintiff (to whom the cheque was indorsed) had given good consideration for the cheque: it was not as if the cheque had been originally given for nothing at all (as, *e.g.*, for a merely void wager): it was sufficient defence that the cheque had been originally given in payment of a bet on a "game" or "pastime" (viz., horse-racing), and that the plaintiff knew this at the time when he accepted the cheque.

For the purposes of the Act of 1835 it makes little difference whether the betting or gaming itself happens to constitute a police offence, and whether even the game itself is illegal to play at.[2]

As to what constitutes a gaming or wagering contract under the Act of 1845, the two essential characteristics are that (1) each party has the chance of either gaining from or losing to the other money or something of a money value upon the issue of an event which is uncertain to both at the time of the contract, and (2) that the only real inducement *on both sides* to enter into the agreement is the *creation* of an entirely new chance of gain or loss.[3]

And again (2) "the essence of gaming and wagering is that one party is to win and the other to lose upon a future event which at the time of the contract is of an uncertain nature—that is to say, if an event turns out one way A will lose, but if it turns out the other way he will win.[4]

[1] 5 & 6 Will. IV, c. 41.

[2] "Faro," "Basset," "Hazard," "Passage," and "Roulet" are prohibited by Acts of Geo. II: these Acts prohibit the games and penalise the players.

[3] *Carlill* v. *Carbolic Smoke Ball Co.* [1893], 1 Q. B., C. A. 256.

[4] *Per* Cotton, L.J., in *Thacker* v. *Hardy* [1878], 4 Q. B. D. 685, also *per* Channell, J., in *Richards* v. *Starck*, L. R. [1911], 1 K. B. 296.

The question as to what actually constitutes a gaming or wagering contract under the Acts of 1835 and 1845 presents little difficulty. Most of the cases under the Acts of 1835 and 1845 are concerned with collateral contracts indirectly connected with an original gaming or wagering transaction.

The general rule is that if a transaction is actually *prohibited*, a collateral contract made in furtherance of it is itself void, even if the collateral contract is under seal, and so requires no consideration at all, *e.g.*, a contract (under seal) to sell land in order that it might be resold by lottery;[1] and the same principle applies if the main agreement is merely stigmatised as illegal by statute and directed to be regarded as such, as in the case of *Woolf* v. *Hamilton*,[2] but if the main contract is merely void (as under the Act of 1845), a collateral contract made in furtherance thereof may be perfectly valid. And sometimes even a contract may be valid, though made in connection with an "illegal" contract within the meaning of the Act of 1835. In the case of *Bubb* v. *Yelverton*[3] the action was brought against the representative of the Marquis of Hastings (deceased) on a bond for £10,000: the Marquis, having incurred heavy losses in horse racing, and being threatened with expulsion from the Jockey Club and with being posted as a defaulter at Tattersall's, gave a bond for £10,000 in consideration of these threats not being carried out. It was held that the bond was perfectly good and could be proved against the deceased's estate, because it was not a promise to pay racing debts, but a promise to pay in consideration of the forbearance to post him as a defaulter: it was held that this forbearance was good consideration quite ulterior to and independent of any racing debts, and that the object of the bond was not to pay racing debts, but to avoid the

[1] *Fisher* v. *Bridges* [1854], 3 E. & B. 642.
[2] 2 Q. B., C. A. 338.
[3] [1870], 19 Wm. Rob. 739.

consequences of not having paid them. It does not seem to have occurred to the Court to consider whether the threats themselves had any justification in law, made as they were with a view to extorting money which was not due at the time when they were made. In the case of *ex parte Pyke*,[1] it was held that money advanced to a betting agent to pay lost bets could be recovered, and proof of the promissory notes was ordered to be admitted as against the debtor's trustee in bankruptcy: for it was held that the notes were not a security for money "knowingly lent or advanced for gaming or betting" within the meaning of the Gaming Act of 1835, as that Act only applied to loans to make bets, and not to loans for the purpose of paying lost debts.

In *Read* v. *Anderson*,[2] it was held by the Court of Appeal (affirming the decision of the Queen's Bench Division) that the employment of an agent to make a bet in his own name on behalf of his principal, may imply an authority to pay the bet if lost, and on the making of the bet that authority may become irrevocable: in this case the employer was compelled to repay his agent money expended by him in discharging his employer's bets, even though the agent's authority to do so was revoked; for if the agent had not paid he would have been posted as a defaulter.

In *Seymour* v. *Bridge*,[3] the defendant was held liable to indemnify his agent (the plaintiff) against loss in paying for shares which were void by Leeman's Act; for although the shares themselves were void, yet the Stock Exchange usage to recognise these faulty documents was known to both parties, and the agent would have incurred expulsion had he not paid for them; in this case the decision in *Read* v. *Anderson* was strictly followed.

[1] [1878], 8 Ch. D. 756.

[2] [1884], 13 Q. B. D., C. A. 776.

[3] [1885], 14 Q. B. D. 460.

In the case of *Bridger* v. *Savage*,[1] it was held that a betting agent, who was promised a commission of 5 per cent. of the winnings, was liable to pay the balance due to his principal, after deducting losses and the 5 per cent. commission: in other words, the contract between principal and agent was valid, even though the employment consisted of making void contracts.

In the case of *Cohen* v. *Kittle*,[2] the failure of a betting agent to win money, by neglecting to make the bets which he had agreed to make, was held not actionable: for an agent is only liable for negligence when his principal has suffered real loss or actual damage, and not merely a possible loss; and in this case the loss was somewhat hypothetical, as the Act of 1845 makes all betting and wagering debts void.

In consequence of some of these recent decisions, especially *Read* v. *Anderson*, the Gaming Act of 1892 was passed to alter the law in one respect. This Act[3] enacts as follows:—

> "Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by 8 & 9 Vict., c. 109, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto, or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money."

This section has the effect of reversing the law as laid down in some of the previous decisions. The latter part of the above section, viz., that which makes void the promise to pay any sum of money by way of commission, fee, or reward in respect of any such contract, etc.—has a partial effect on the decision in *Bridger* v. *Savage*: the betting agent is still bound to account for money *received* on behalf of his principal; but the principal is no longer bound to pay the promised commission or reward.

[1] [1885], 15 Q. B. D., C. A., 363. [2] [1889], 22 Q. B. D., 680. [3] 55 Vict., c. 9.

The first case under the new Act was *Tatam* v. *Reeve;*[1] and it was simply the antithesis of *Read* v. *Anderson.* In *Tatam* v. *Reeve* the defendant had expressly requested the plaintiff to pay his (the defendant's) lost bets, and afterwards refused to recoup him, and pleaded the Act of 1892. It was held that although the request to pay implied a promise to repay, yet the defendant was relieved by the Gaming Act of 1892, because the defendant's promise was to pay *money which had been paid* by the plaintiff *in respect of* contracts void by the Gaming Act of 1845.

But in the case of *De Mattos* v. *Benjamin,*[2] the principal was plaintiff, and the betting agent was defendant; the claim was for money *received* by the agent on the principal's behalf; and it was held that the Act of 1892 applied only to money *paid,* and not to money *received* by the agent in respect of contracts void by the Act of 1845: and that therefore the principal was entitled to recover the winnings received by his betting agent on his behalf.

In the case of *O'Sullivan* v. *Thomas,*[3] the plaintiff was held entitled to recover money which he had deposited with a stakeholder (to abide the issue of a race), and which the plaintiff had demanded back before the stakeholder had paid it over to the winner. The defendant pleaded the Gaming Act of 1892, but it was held that the word "*paid*" meant *paid out and out,* and not merely deposited with a stakeholder. This decision merely followed *Hampden* v. *Walsh* (which is not altered by the Act of 1892), and was approved by the Court of Appeal in *Burge* v. *Ashley and Smith, Limited.*[4]

In *Carney* v. *Plimmer,*[5] the action was for money lent. The defendant had borrowed £500 from the plaintiff, who, at the defendant's request, deposited that amount with a

[1] L. R. [1893], 1 Q. B. 44.
[2] [1894], 63 L. J., Q. B. 248.
[3] L. R. [1895], 1 Q. B. 698.
[4] L. R. [1900], 1 Q. B., C. A. 744.
[5] L. R. [1897], 1. Q B., C. A. 634.

stakeholder; and the terms of the loan were that if the defendant won his wager he should repay plaintiff the money, but not otherwise. The defendant pleaded the Act of 1892. It was held (on appeal) that the transaction was not a simple loan of money, but money "paid in respect of a wager" within the meaning of the Act. It is thought, however, that *Carney* v. *Plimmer* decides nothing as to whether money lent to make bets is recoverable: to this we shall refer presently.

In *Saffery* v. *Mayer*,[1] it was held that money paid by one partner (in a betting transaction) on the other's behalf in settling lost bets could not be recovered: for the Court of Appeal held that it was money *paid in respect of* contracts void by the Act of 1845, and therefore itself void by the Act of 1892.

The case of *Moulis* v. *Owen*[2] is complicated by involving several issues, viz., effect of Gaming Acts, legality of consideration, and the Comity of Nations, which is sometimes called Private International law. In this case the defendant, having lost money at baccarat in Algiers (where the gambling debt was legal by the French law), had drawn in payment thereof a cheque on an English bank. The Court of Appeal reversed the decision of the King's Bench, and held that, as the cheque was drawn on an English bank, and as the consideration was "illegal" within the meaning of sect. 1 of the Gaming Act of 1835, therefore the plaintiff's action on the cheque could not be maintained. The case of *Hyams* v. *Stuart King*[3] was somewhat similar to that of *Bubb* v. *Yelverton*. In this case (*Hyams* v. *Stuart King*) the defendant gave plaintiff a cheque for the amount of bets lost to him. At the request of defendant the cheque was held over for a time: subsequently a fresh verbal agreement was made, by which, in consideration of the plaintiff

[1] L. R. [1901], 1 K. B., C. A. 11. [2] L. R. [1907], 1 K. B., C. A. 746.
[3] L. R. [1908], 2 K. B., C. A. 696.

holding over the cheque for a further time and refraining from declaring the defendant a defaulter, the defendant promised to pay in a few days, but failed to do so.

It was held by the President, Sir Gorell Barnes, and Farwell, L.J. (upholding the decision of Darling, J.), that the forbearance of the plaintiff to declare the defendant a defaulter constituted a good consideration for a fresh agreement, and that the plaintiff was entitled to recover. It mattered not that the cheque was given for an "illegal" consideration (under the Gaming Act of 1835), and that the original promise to pay was void by the Act of 1845. It was admitted that the original promise to pay was void by the Act of 1845, and (*per* the President) that the mere giving of time to pay that which cannot be enforced does not amount to consideration: but the plaintiff's forbearance to declare the defendant a defaulter was held new consideration for a fresh promise to pay.

To the present writer this decision has always seemed totally indefensible. Farwell, L.J., said, "There is certainly nothing illegal in paying or receiving payment of a lost bet: it is one thing for the law to refuse to assist either party in their folly if they will bet; it is quite another to forbid the loser to keep his word."

Yes, but it is also one thing to *allow* the loser to keep his word, and quite another thing to *allow* him to be threatened and bullied into paying what was not legally due. Under the Act of 1845 the payment of a betting debt is (at best) simply *donum gratuitum*. There is nothing illegal in asking, offering, giving, or receiving a free gift; but to demand it with menaces (no matter what the menaces are) is an offence under statute 24 & 25 Vict., c. 96, sect. 44.

If the defendant had a right not to be sued at law on the original transaction, he had at least an equal right not to be threatened, or bullied, or subjected to any coercive process with a view to extorting money not legally due. Fletcher

Moulton, L.J., said in his dissenting judgment, "If a son loses a bet of £20 which he cannot pay, it makes no difference, in my mind, whether the bookmaker says, I will tell your father if you don't pay the bet, or I will tell your father if you don't give me £20. In the one case he is trying to get a contract to pay the bet, and in the other case a contract to pay blackmail. Neither of these contracts will be enforced by the Courts."

Farwell, L.J., says, "but blackmail (I quote *The Oxford Dictionary*) is to extort money from, by intimidation, by the unscrupulous use of official or social position, or of political influence or vote." But why go to the dictionary for the definition of an offence defined by statute?

Can it be that Farwell, L.J., considered that there was "reasonable and probable cause" within the meaning of sect. 44 of the Larceny Act (1861) for the menaces by means of which the plaintiff obtained the additional promise? Reasonable and probable cause is indeed recognised as a ground for compromising a suit in dubious cases wherein each party has a *bonâ fide* belief in his own right; but in this case the plaintiff could not have supposed that he had any legal claim at the time when he found it necessary to extract the additional promise. Even before perusing the report, it seemed to the present writer a plausible guess that the judges were influenced in their decision by some idea of the moral obligation to pay a betting debt. Now note the words of Farwell, L.J., "Everyone is entitled to enforce, if he can, the performance of a moral obligation." But we little thought that Farwell, L.J., would have so far stultified his *ratio decidendi* by invoking Mansfield law.

In *Saxby* v. *Fulton*[1] we have another case of Private International law. In this case it was held that money lent at Monte Carlo for the purpose of gaming was recoverable in this country, because by the *lex loci contractus* there was no

[1] L. R. [1909], 2 K. B., C. A. 208.

taint attaching to the transaction, and so far as this country was concerned it was merely an action for money lent. The case differs from *Moulis* v. *Owen* mainly inasmuch as in that case the action was on a cheque drawn on an English bank, the cheque being considered an English contract.

According to Anson,[1] it was still undecided in 1912 whether money lent to make bets could be recovered. Professor Dicey was of opinion that though by the Act of 1835 securities for money lent for betting on games were void, yet the loans themselves were recoverable: that the Gaming Act of 1892 did not alter the law on the subject: that the words "money lent under or in respect of a wager" were not meant by that Act to include money lent to make bets; and that money lent to pay lost bets was still recoverable.[2]

But in the case of *Chapman* v. *Brownlow*, it was held by Coleridge, J., in the King's Bench on January 11th, 1913, that money lent *to make a bet*, viz., to back a horse, was not recoverable.

In the same year as the Gaming Act (1892) there was passed the Betting and Loans (Infants) Act,[3] which is directed against soliciting or inducing infants to bet or to borrow money. In addition to certain penal clauses, it provides that any agreement or instrument, including negotiable instruments, if made or given for the repayment of money representing or connected with a loan void at law—are *absolutely void* (sect. 5). This places a negotiable instrument for a void loan made by an infant in a worse position than a negotiable instrument under the Gaming Act of 1835, and in the same position as a security or negotiable instrument under the Act of Anne (1710). In other words, the instrument being "absolutely void" is mere waste paper, and not even an innocent purchaser for value can recover upon it.

1 *Law of Contract*, 13th edit., p. 225.

2 *Law Quarterly Review*, 1904, p. 436.

3 55 & 56 Vict., c. 4.

The next statutory limitation of the freedom of contract, and a very important one, is the Moneylenders Act of 1900.[1] Since the repeal of the Usury Laws in 1854 (by 17 & 18 Vict., c. 90) there had been no restriction whatever on usurious bargains, except certain recognised principles of Equity, whereby bargains with expectant heirs and reversioners might be set aside on the ground of undue influence and unfair advantage taken by the moneylender of the weakness and necessities of the person raising the money. The Moneylenders Act (1900) applies only to professional moneylenders, viz., those who make moneylending their sole or primary business, or advertise themselves as such; bankers, pawnbrokers, registered societies, and bodies specially incorporated by Act of Parliament are expressly excluded (sect. 6).

Section 2 of the Act requires every moneylender to register the name in which he carries on business, and all the addresses at which he carries on the business; and also imposes penalties on any unregistered moneylender who carries on the business at all, and also on any registered moneylender who carries on business in any other than his registered name or in an unregistered place.

Section 4 imposes penalties on any moneylender or his agent who, "by any false, misleading, or deceptive statement, representation or promise, or by any dishonest concealment of material facts, fraudulently induces or attempts to induce any person to borrow money, or to agree to the terms on which money is, or is to be, borrowed." The effect at Civil law of non-compliance with any of the above penal provisions will presently be noted.

Section 1 (1) provides that where proceedings are taken in any Court, either by or against a moneylender, in respect of a loan, "and there is evidence which satisfies the Court that

[1] 63 & 64 Vict., c. 51.

the interest charged in respect of the sum lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a Court of Equity would give relief"—then "the Court may re-open the transaction, and take an account between the parties;" and "re-open any account already taken, and may relieve the borrower from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal, interest and charges, as the Court, having regard to the risk and all the circumstances, may adjudge to be reasonable"; that the Court "may order the creditor to repay any excess that has been paid or allowed in account by the debtor"; and "may set aside or revise or alter any security given or agreement made in respect of money lent by the moneylender; and if the moneylender has parted with the security, the Court may order him to indemnify the borrower or other person sued."

These last words of sub-sect. (1) are meant as a sort of corollary of sub-sect. (5), by which it is provided that "nothing in the foregoing provisions of this section shall affect the rights of any *bonâ fide* assignee or holder for value without notice." In other words, the *bonâ fide* purchaser for value of a negotiable instrument from a moneylender can recover upon it from the debtor: but then, if the original bargain were such as between borrower and lender, the Court would cancel or reduce the debt, it will to the same extent indemnify the borrower as against the lender.

Partly in consequence of sub-sect. (5), it is provided by sub-sect. (2) that any Court having jurisdiction for money lent may (notwithstanding any agreement to the contrary) entertain any application by the borrower, even before the time for payment has arrived.

A few cases will illustrate the working of the Act. In *Litchfield* v. *Dreyfus*[1] it was held by Farwell, L.J., that a retired art dealer, who lent money to a few old customers and friends in the curio trade, was not a "moneylender" within the meaning of the Act.

The case of *Victorian Daylesford Syndicate* v. *Dott*[2] illustrates the working of sect. 2 (1) of the Act. The defendant in this case practised as an unregistered moneylender. In so doing he rendered himself liable to certain penalties. What was more to the point in this case was that the whole contract was vitiated by the illegality. It was held that sect. 2 (1) of the Moneylenders Act of 1900 applies to a moneylender who has not registered his name under the Act; and the result is that he cannot make any valid "agreement in the course of his business as a moneylender with respect to the advance and repayment of money, or take any security for money in the course of his business as a moneylender." In this case the defendant's claim was dismissed; and, on the suit of the plaintiffs, the securities already received by the defendant were ordered to be returned.

The case of *Saunders* v. *Newbold*[3] illustrates the application of sect. 1 of the Moneylenders Act. In this case the House of Lords, affirming the decision of the Court of Appeal, held that the relief which sect. 1 of the Act extends to the borrower is not limited to cases in which before the Act the Court of Chancery would have given relief; and that the policy of the Act is to enable the Court to prevent oppression, leaving it to the discretion of the Court to weigh each case upon its own merits, and to look behind a class of contracts which peculiarly lend themselves to an abuse of power. In this case it was found that the probable risk of non-payment was slight, and that the rate of interest would have amounted to 418 per cent. per annum: the

[1] L. R. [1906], 1 K. B. 590.
[2] L. R. [1905], 2 Ch. 624.
[3] L. R. [1906], A. C. 461.

debtor was required by the Court to repay the principal, plus 10 per cent. interest, minus the amount already repaid.

In *Carringtons Limited* v. *Smith*[1] it was held that, although the rate of interest was high, that fact did not of itself render the transaction "harsh and unconscionable" within the meaning of sect. 1 of the Moneylenders Act; and that, having regard to the risk and to all the circumstances of the case, amongst which the Court was entitled to consider that the defendant understood the transaction, and without any misrepresentation or pressure by the plaintiffs, had voluntarily agreed to pay the interest asked, 75 per cent. per annum was a reasonable rate of interest, and not "excessive" within the meaning of the Act.

There are a few miscellaneous statutory restrictions on the right of freedom of contract, apart from the Criminal law. For instance, under the Workmen's Compensation Act 1906,[2] contracting out of the Act is prevented by sect. 3 (1), except under certain restrictions prescribed in the sub-section: "but save as aforesaid, this Act shall apply notwithstanding any contract to the contrary . . . . ."

By the Conveyancing and Law of Property Act 1881[3] it is provided by sect. 15 (1) and (2) that a mortgagee out of possession shall, on the same terms on which he would have been bound to re-convey, assign and convey the mortgage to any third person at the direction of the mortgagor; and, moreover (sub-sect. 3), that this section shall apply and have effect "notwithstanding any stipulation to the contrary."

But it should be remembered that most of the restrictions on the right of freedom of contract are statutory; and that every extension of the Criminal law involves, at least indirectly, some statutory interference with the right of freedom of contract.

R. L. MARSHALL.

[1] L. R. [1906], 1 K. B. 79. [2] 6 Edw. VII, c. 58. [3] 44 & 45 Vict., c. 41.

## III.—THE RATING OF RAILWAYS AND CANALS.

### Some Difficult Problems.

IN a case heard so long ago as the year 1851, and called for the purpose of differentiation "the second *Tilehurst Case*," the Court delayed giving judgment in the hope "that Parliament might interpose to relieve the judges from the difficult position in which they were placed when called upon to administer the existing law with respect to the rating of railways," and, it might have been added, of canals. That pious wish must have found a ready response in the minds of all who found themselves called upon to consider the difficulties and the conflict of railway and canal rating cases. What was chaos then is—with very little modification and some extension—chaos now: for if some of the less important questions have been settled, the vital problems still await solution, and, indeed, the very difficulty which caused the Court to delay in the delivery of its judgment is one which still has to be considered with very great doubt and with no prospect of certainty.

The question which formed the subject of the most recent case[1] is the one with which we shall first concern ourselves, as it is of the greatest importance and is still open to a considerable amount of argument. It deals with the broad question as to what principle of rating should be applied when a railway or canal runs through many parishes. The cases may be said broadly to be divided into two classes: (A) Those which support the parochial system, and (B) those in which the mileage system has been applied. But distinctions have been drawn which permit of no definite classification. Much of the confusion which has arisen has found its origin in the antagonism of these two principles and the difficulties which result if either of the systems

[1] *The Leeds and Liverpool Canal Company* v. *The Assessment Committee of the Wigan Union.* This case has not been reported, but it was heard in the Divisional Court in May of this year (1913), and the appeal was dismissed.

were, in an extreme case, carried to its logical conclusion. This will become evident a little later. Both railway and canal cases must be considered, as the principle to be applied is the same, the regrettable feature being that frequently conflict has arisen which might, to a great extent, have been avoided if the cases had been considered collectively instead of an artificial line being drawn between the two bodies of cases which had no foundation in fact or law. As the cases have been differentiated, we will direct our attention first to the rating of canals, particularly as the recent case was a canal case and it raised several points of great interest.[1] Earlier cases were reviewed and considered, and apparently we are as far from a solution as we were at the time when the problem first became acute. It indicates once again how great is the reluctance of the Courts to interfere with those whose duty it is to concern themselves with facts. It becomes so difficult to sever law from fact in rating cases that a too severe caution has only resulted in a total misunderstanding as to the principle to be adopted in certain cases. The Courts have directed their attention solely to the principles themselves, and as they contract or expand according to the conditions affecting the area over which some system is to be applied, the decisions of necessity are conflicting and confusing.[2] Yet in the absence of some legislative enactment or authoritative pronouncement from the Bench, assessment committees will continue to be in doubt as to what principle should be adopted in fixing the rateable value of railways and canals, and parochial authorities will continue to wage their conflicts in a wild endeavour to adopt a system which shall at least be to their own advantage, though it be to the disadvantage of other parishes and the company to be rated.

[1] *The Leeds and Liverpool Canal Case* (*supra*).

[2] *The Shoreditch Assessment Case* (L. R. [1910], 2 K. B. 859) affords a remarkable illustration of this difficulty.

The present confusion finds its origin in the difficulty of applying the Parochial Assessment Act 1836[1] to railways and canals. Whether it was at the time the Bill was considered, that railways and canals escaped the special attention of the Legislature, or it was thought that they did not require any special provision (which, even bearing in mind some of the recent legislative enactments, seems to be impossible) will never be known. Certain is it, however, that they received no special consideration, and that from their very nature they demanded treatment substantially different from anything contained in the Act itself.

The case of *R.* v. *Kingswinford*[2] may be said to have established the parochial principle. It was there held that the canal company was not to be rated for a part of the whole amount earned along the whole line of the canal in proportion to the length of the canal in that parish, but they were to be rateable only in proportion to the net profits earned in the parish. Bayley, J., said, "Where there is a long line of canal extending through different parishes, although the money produced by the tonnage collected in all the parishes constitute one common fund out of which all the expenses are to be borne, still the proportion which those expenses may bear to the tolls collected, even in a case where the rates are the same along the whole line of the canal, may vary in different parishes." This states lucidly the basis on which the parochial principle is founded, but there is one feature of the judgment on which emphasis must be laid. It is obvious that the Court foresaw the difficulty which might arise in a case where each part of a canal varied in the amount of profits earned. "If a canal runs through six different parishes and there is the same traffic through the whole line of the canal, every part of the canal will earn an equal part of the tolls."

[1] 6 & 7 William IV, c. 96.
[2] [1827] 7 B. & C. 236.

In the case of *R.* v. *Woking*[1] the parochial principle was adopted, and to some extent extended. Lord Denman, C.J., in the course of his judgment, referring to the deduction which should be made from the gross receipts in the parish of Woking, said that, as the necessary repairs and expenses were found to be equal throughout the line, the proportion to be deducted was to be ascertained by a mileage calculation. This implies that, had the repairs and expenses not been uniform, it would have been proper to deduct the total amount of repairs in the particular parish.[2] In the case of the Oxford Canal Company this was further emphasised, Littledale, J., observing, "The banks in one parish may require more repair than in another, or there may be locks which require frequent repair; so that it may happen that a given part of a canal may yield no profit whatever."[3] This suggests the difficulty which sooner or later has to be met in the application of the parochial principle. If followed to its logical conclusion, it means that if any branch of a canal or railway be unproductive, whatever purpose it may fill in feeding the main line of the canal or railway, rateable value ceases to exist.[4] In other words, if it be applied *per se* contributive value must in no sense be considered, and each parish must be assessed only on its particular profits, ceasing to be rateable if at any time expenditure becomes greater than the receipts. But this would be antagonistic to the whole principle of rating, it would strike a deadly blow at the "hypothetical tenant," it is in violent distinction to all the decisions on the Parochial Assessment Act 1836, it has never been recognised, and it is a conclusion which could not seriously be urged.

[1] [1835] 4 A. & E, at page 50.

[2] The principle was freely applied to railways in a number of cases. *R.* v. *London and South Western Railway Company* ([1842] 1 Q. B. 588); *R.* v. *Great Western Railway Company* ([1846] 6 Q. B. 179). [3] 10 B. & C. 163.

[4] This was the difficulty which the Divisional Court recognised in the recent case of the Leeds and Liverpool Canal Company. They refused to consider how an assessment should be arrived at in a case where the balance was a minus one.

This is the obstacle which prevents any total adoption of the parochial system, and yet, if it is abandoned, it undermines the whole basis of rating. There appears to be no way out of the difficulty. If it is adopted, the Court must say how a minus quantity is to be dealt with in a parish where expenditure is greater than receipts. How can they do this and still remain faithful to the parochial principle? If it is departed from it means the introduction of some other system which only finds expression at a time of difficulty and which is recognised as being less suitable than the system which it is attempting to assist. Contributive value, of necessity, becomes the criterion of value, and this means the adoption of the mileage principle, which has already been declared to be improper. No such temporary evasion is possible: either some really comprehensive scheme must be adopted and the parochial principle destroyed, or a parish must, if exceptional circumstances exist, cease to be rateable, which is a *reductio ad absurdum*. Of course, a fictitious value and a fictitious rate may be given to the property, but this is very undesirable and certainly opposed to the spirit and the letter of rating law.

The case of *R.* v. *Coventry Coal Company*[1] was a departure from the trend of the earlier cases, and reverted to the application of the mileage principle as opposed to the parochial principle. It was there held that, in assessing the rate, the expenses of repairing and maintaining the locks and works of a canal in a particular parish should be spread over the whole waterway, and that an apportionment should be made of the total expenses of the entire canal and a certain proportion taken to attach to the parish where the rate was to be levied. Lord Campbell, C.J., followed the earlier case which he himself had heard, and in the course of his judgment he used the following significant words: "In controverting this authority[2] reliance was placed by the

[1] [1859], 1 E. & E. 572.

[2] The judgment in *R.* v. *Great Western Railway Company* (15 Q. B. 1085).

counsel for the appellants upon what was said by Bayley, J., and Littledale, J., in *Rex* v. *The Oxford Canal Company*, as to the expense of repairing the banks of a canal having to be deducted as local. But these very learned judges do not then seem to have had in contemplation important special works constructed necessarily for the use of the whole canal. If there were an aqueduct created to carry a canal across a valley, the annual expense of repairing it might very possibly be greater than the whole of the gross receipts from the traffic on the canal within the parish where the aqueduct stands. Shall it be said that the canal company is not liable to be rated to the relief of the poor within this parish? If not, the ratepayers are damnified by the canal passing through the parish; for thereby the number of the poor to be relieved may be increased, and the property rateable would certainly be diminished, for the land occupied by the canal which was before rated would cease to be rateable. But no injustice or inconvenience seems to follow from saying that such expenses are to be deducted from the gross receipts of the whole line of the canal or of the railway."

This shows an adequate appreciation of the difficulties which may arise on the application of the parochial system, but it leaves untouched the greater difficulties which would arise on a too rigid adherence to the mileage principle. The learned judge realises that the parochial system must in many cases result in great injustice and considerable doubt, but it is difficult to follow the distinctions drawn between expenses which are local and expenses which are general. Whether the subject of the repairs be the banks of a canal or an aqueduct does not appear to matter, as in both cases expenditure is necessary in order that the canal may continue to earn its profits. It is as necessary to the maintenance of the canal that subsidences of the banks should be remedied as that a tunnel or aqueduct should be

repaired. There is no intrinsic difference in the subjects themselves, and the whole question is reduced from that of material to that of amount. What was really said was this, "If the amount be small it should be considered as a parochial expense, if heavy it should be viewed as an expense 'other than local' and consequently to be deducted from the gross receipts of the whole line of the canal." But this means the adoption of the mileage system *in toto* and the abandonment of the parochial principle if the cases already decided are to be taken as constituting the only alternatives open to assessment committees.

The decision in this case is consistent with the case of *R.* v. *The Great Western Railway Company*[1] which was earlier decided by Lord Campbell, and it may not be out of place to refer briefly to his judgment. He was, of course, referring to railways, but it meant the application of the same principle and the consideration of similar facts. He said, "How, then, are the deductions from the total gross revenue, which constitute the difference between it and the total net rateable value, to be apportioned so as to arrive at the actual sum which constitutes the rateable value of the two-and-a-half miles?" There is no difficulty in giving the first answer; indeed, principle and authority leave us no option, it must be done by acting on what is called the parochial principle. We are dealing with a parochial question, with one in which the interests of the several parishes on a line of railway are quite distinct. We are to ascertain what expenses are incurred in earning the gross receipts on the two-and-a-half miles, what charges, parochial or otherwise, they are liable to, what is fairly to be deducted for tenants' profits, and so on; the same process in kind is to be gone through with regard to the two-and-a-half miles as would be with regard to the whole line, if that were all in one parish. This principle does not preclude a consideration of charges and expenses

[1] 15 Q. B., at pp. 1089, 1090, 1092.

*wherever arising locally*, which are necessary for keeping the subject of assessment at the value which is made the measure of that assessment."[1] Thus the parochial principle was adopted with approval, because "principal and authority" left no option; but at the same time the mileage system received a blessing, and the confliction became complete. There is no method, proper and sufficient, by which those called upon to consider the principles can escape from these labyrinthine difficulties. It appears to be an easy and effective system to take into consideration "charges and expenses wherever arising locally"; but it follows, *ex necessitate rei*, that there must be a readjustment of parochial values. If, as is suggested, all the expenses arising in a parish are not deducted from parochial receipts, but, as contributing to the earnings everywhere on the canal or railway, are set off against the gross receipts, then, in such a case, the parochial principle is avoided and the company to be rated has every right to raise objection to the amount of the assessment value. An excellent attempt was recently made in the *Leeds and Liverpool Canal Case*[2] to induce the Court to sanction a new principle which it was contended would eliminate much of the present perplexity and doubt. The Court, however, refused to consider the general question, and followed Lord Campbell in refusing to rule that all expenses arising in a given parish should be deducted from the receipts in the parish.[3] Thus, not only is the position still unimproved, it has become even less certain, and there appears to be no immediate prospect of anything more definite. Something will sooner or later have to be done. But what?

W. F. WYNDHAM-BROWN.

[1] See the case of *London and North Western Railway Company* v. *Harborne* ([1870], 34 J. P. 644).

[2] *Supra.*

[3] The Court appeared to ignore *The London and North Western Railway Company* v. *Harborne* ([1870], 34 J. P.).

## IV.—PITT, THE YOUNGER, AS A BARRISTER.

IT has been the privilege of the Honourable Society of Lincoln's Inn to include among its members many men who have become distinguished statesmen. Among the most eminent of the names which have been inscribed on its books is that of the younger Pitt. The rapid political success which Pitt attained early diverted his attention from the practice of the law to the House of Commons, but there can be no doubt that, if he had remained at the Bar, he would have secured a brilliant career. With his appointment to the office of Chancellor of the Exchequer at the age of twenty-three, his legal career came to an end, but he did not lose his interest in the profession. He long kept up his connection with the Western Circuit, of which he was a member, and Lord Stanhope relates that, after he was Minister, he continued to ask his old circuit friends to dine with him, treating them with the old cordiality and kindness. At Pitt's instance an annual dinner took place for some years at Richmond Hill, which was attended by Lord Erskine, Lord Redesdale, Sir William Grant, Mr. Leycester, Mr. Jekyll, and other prominent lawyers.

Lord Brougham, in the chapter of reminiscences which he published under the title of *Recollections of a Deceased Welsh Judge*, gives an interesting account of Pitt's early life. The future Minister lived with St. Andrew St. John, afterwards Lord St. John, in a double set of chambers within the same outer door, in Old Buildings, now Old Square, Lincoln's Inn. It was while residing here that Pitt made his first essay in public speaking. Pitt had often practised speaking as well as composition under the superintendence of his father, but he was desirous of trying how his voice and his nerves would stand the test of a public assembly. Putting on a mask, as was the mode in those

days, he went, accompanied by St. John, to one of the numerous debating places of the time. Brougham suggests that it was Mrs. Cornelly's that was visited by the future Minister. There Pitt made his first essay in oratory, with, it need hardly be said, the utmost success. St. John used to say that Pitt from the first had a special liking for legal discussions. He was a regular attendant at the Court of King's Bench, and used to dine afterwards at a law club, as was the universal custom at that time among lawyers. At dinner he took the most unceasing and lively interest in all the professional conversation of the table. The hour of the dinner was four, and the bill was called for at six, and after dinner all departed to chambers. The law clubs have long given way to the West End clubs—an innovation that Brougham regretted, because it deprived the young lawyer and the student of the benefit of hearing cases and points that arose in the Courts familiarly discussed by lawyers of experience. In 1781, Pitt, having become Member of Parliament for Appleby, joined one of the clubs near St. James's Street; but it was his habit, even when he dined at the West End of the town, to come back to Lincoln's Inn early enough to make sure of getting in before the wicket was shut at twelve o'clock. He did not go to chambers, but to Will's Coffee-house, which was situated within Lincoln's Inn, and which was, by order of the Society, closed at midnight. There Pitt sat down with a newspaper, a dry biscuit, and a bottle of very bad port wine, the greater part of which he finished cold, whatever he might have eaten or drunk at dinner.

Pitt, as might have been expected, joined the Western Circuit. His father's old connection with Bath, and the family property in Somersetshire, naturally influenced him in making his choice. Among those who were contemporary with him on circuit were William Grant, afterwards Master of the Rolls, John Freeman Mitford, afterwards Lord

Redesdale and Lord Chancellor of Ireland, and William Adam, afterwards Lord Chief Commissioner of the Scottish Jury Court. It is interesting to mention that he filled the post of "Recorder," an office in which he was succeeded by another future statesman, Tierney. He described his first experience of circuit in a letter to his mother:—

"DORCHESTER,
"*August* 4, 1780.

"You will be glad to have early information of my having arrived prosperously at this place, and taken upon me the character of a lawyer. I have indeed done so, yet no otherwise than by eating and drinking with lawyers; and so far I find the circuit perfectly agreeable. I write this in the morning lest I should not have time after. There is not, to be sure, much probability of my being overwhelmed with business, but I may possibly have my time filled up with hearing others for the remainder of the day. . . . My gown and wig do not make their appearance till two or three hours hence, as great part of the morning is taken up by the judge's going to church, where it does not seem the etiquette for counsel to attend."

Pitt did not receive many briefs on circuit, but he showed his ability in what work he did. At Salisbury, in the summer of 1781, he was employed by Mr. Samuel Petrie as junior counsel in some bribery causes that had resulted from the Cricklade Election Petition. There are reports of two speeches that he made in these causes, but neither report extends to more than a few lines. In giving judgment on the point which the second of these speeches involved, Mr. Baron Perryn said, that "Mr. Pitt's observations had great weight with him." It is also recorded that, while acting as counsel for Petrie, Pitt received some high compliments from Mr. Dunning, the leader of the Bar. Nor was this his only exhibition of capacity as an advocate. "I remember also," wrote Mr. Jekyll, one of his brother barristers on the circuit, "that in an action of *crim. con.* at Exeter, he manifested as junior counsel such talents in cross-examination

that it was the universal opinion of the Bar that he should have led the cause."

In London Pitt was equally assiduous in his attention to his profession. Mr. Justice Rooke used to relate how Pitt had dangled several days with a junior brief, and a single guinea fee, waiting till a cause of no sort of importance should come on in the Court of Common Pleas. On another occasion, on a motion for a Habeas Corpus in the case of a man who was charged with murder, in the Court of King's Bench, Mr. Pitt made a speech which excited the admiration of the Bar, and drew down some words of praise from Lord Mansfield. He was retained as junior to Erskine in the case of *Rex* v. *Bate Dudley*. Dudley, who was proprietor of the *Morning Post*, was charged with publishing a libel, and Erskine obtained an acquittal against the summing up of Lord Mansfield. Brougham hints that Pitt was not impressed by his leader on this occasion.

It is evident that Pitt, as a young barrister, was forming decided opinions about those with whom he came into contact. He took a strong dislike to Mr. Justice Buller, an able, but domineering, and almost brutal judge. Lord Mansfield, when he retired from the post of Lord Chief Justice, tried to prevail on the Ministry to appoint Buller as his successor. "But Mr. Pitt," says Brougham, "while at the Bar, had seen things in that able and unscrupulous magistrate, which made him resolve that no such infliction should fall on the English Bench." The principal cause of offence in Buller was his conduct in a trial at Bodmin, affecting the political rights in one of the pocket boroughs of the Buller family. Buller, who had presided, had shown undue partiality for his own connections, and had disgusted the young barrister, who was quietly taking stock of the judge's behaviour. Thurlow pretended that it was he who had secured the appointment of Kenyon, and declared that he had "hesitated long between the corruption of Buller

and the intemperance of Kenyon." But it was Pitt, and not Thurlow, that had effectually prevented the appointment of Buller as Lord Chief Justice.

It was, in great measure, to the early friendship of Pitt that Richard Pepper Arden owed his great success. It is related by James Grant, that Pitt and Arden became acquainted through the accidental circumstance of their occupying chambers on the same staircase in Lincoln's Inn. It was by Pitt's interest that Arden was created successively Solicitor-General and Attorney-General, and it was Pitt who made him Master of the Rolls in 1789, and secured his elevation to the Peerage as Lord Alvanley.

In 1782 Pitt's attention was turned for ever from the Bar by his appointment to the office of Chancellor of the Exchequer. It is probable that if he had continued to practise, he would have become one of the ornaments of his profession. Lord Campbell said that he had heard much speculation as to the probable success of the younger Pitt, if he had remained at the Bar. "I think," said Lord Campbell, "that it must have been splendid; but, unless he had exhibited greater variety of manner, and a more familiar acquaintance with the common feelings of mankind, it never could have approached that of Lord Erskine." He goes on to add, with regard to Pitt's life-long rival, that Fox, in arguing questions of law at the trial of Hastings, excited the astonishment and admiration of the judges, and he expresses the opinion that, in every branch of forensic practice, Fox would have been supreme.

Pitt became a bencher of Lincoln's Inn, and his name crops up in the curious and rather interesting case of *The Earl of Rosslyn and Another* v. *Jodrell*, 1815, in Campbell's Reports. In that case, a barrister of Lincoln's Inn, who had not paid his commons and other dues, was sued on the bond which he gave to the Society on his being called to the Bar. He objected to pay, because

he was dissatisfied with the manner in which benchers were elected, and with the management of the affairs of the Society. Scarlett, who appeared for the recalcitrant barrister, said that Mr. Jodrell, who had given much attention to the subject, found that the benchers, generally called "The Ancients of the House," were actually the senior members of the Society, venerable for their years and their learning; while the benchers had of late years been inexperienced young men, many of them unconnected with the law, who were preferred by political influence. This he considered such a change in the constitution of the council formed by the benchers, as to render their orders a nullity, and to dispense even with the payment of the ancient dues of the Society, which were now, he said, so liable to be abused. Sir William Garrow, the Attorney-General, in reply, observed that the Society had had the honour to have the late Mr. Pitt and Mr. Perceval as benchers, and that Lord Sidmouth, Mr. Vansittart, and several other eminent politicians were so then, but they had all been called to the bench on being appointed to the office of Chancellor of the Exchequer, or some other high situation in the law.

J. A. LOVAT-FRASER.

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## V.—FOREIGN LIMITED COMPANIES OPERATING IN SPANISH-AMERICA.[1]

THE last occasion on which formal conclusions were adopted by the International Law Association was at the Congress which met at Berlin in the year 1905, when the draft International Code received your approbation. I may say, in passing, that Art. 8 does not offer

[1] A Paper presented in Spanish by Mr. Wyndham A. Bewes, Barrister-at-law, at the International Law Association Conference at Madrid, October, 1913.

sufficient security to a foreign Government that a particular company or association has been validly incorporated with a lawful object in its country of origin when it treats the mere production of a certificate of a notary public as conclusive evidence that the company has been duly incorporated. At the present time those countries with which this paper is more immediately concerned require further evidence than that, viz.: the corroboration of their Consul-General sometimes fortified by the *visto bueno* of its diplomatic agent. In my view this further formality must still be regarded as likely to be demanded in any future international convention on the subject.

There has been much discussion among jurists as to the legal effect of the authorisation of a foreign company, or rather of its recognition by the State where it proposes to operate. According to the paper read by Señor Estanislao S. Zeballos, which appears in the *Journal du Droit International Privé*, Vol. XXXIII, the position contended for by the Argentine Government in the affair of the Bank of London and the River Plate in 1876, was that the local laws of the province of Santa Fé had given existence to the bank which was in fact a bank founded and operating in London. The Note to the British Government said, "*Les personnes juridiques doivent exclusivement leur existence à la loi du pays qui les autorise et, par conséquent, elles ne sont ni nationales, ni étrangères.*"

I doubt very much whether this doctrine, which does not seem to have been controverted at the time by the British Government, would be supported by many States at the present date; and it may be mentioned that this argument was not necessary in order to substantiate the claim made by the Republic of Argentina that the bank was bound to conform to a law of the State of Santa Fé, which directed local paper obligations to be converted into gold obligations. It is well to remember that the above doctrine was

formerly supported by most of the leading jurists, but has been abandoned by the more recent jurists, although it is still sanctioned by some of the Codes of South America, such as Bolivia and Chile, which attribute this legal existence to the Decree of the Government authorising the respective companies. The Civil Code of the Republic of Mexico says (Art. 39), "No association or corporation possesses a juristic entity unless it is legally authorised or permitted," and apparently this article applies to foreign companies.

But in truth the company is already in existence in the form authorised by its State of origin, and what is done by the country where it desires to function, is to recognise that legal existence for the purposes and effects of the local jurisdiction and administration. The contrary is the case as regards National companies, which are constituted in all countries under the form of an inert entity, which only possesses actual life by virtue of authorisation, recognition, or licence of the executive. From this time they become juristic entities. On the other hand, foreign companies have been recognised by the fact of contracts being permitted by correspondence, by the provisions of international treaties and by the universal permission to litigate in the local Courts. It should be remembered that in the Republic of Argentina and most other States "treaties made with foreign Powers are the supreme law of the Nation" (Art. 31 of the Constitution).

*The meaning of "Domicil."*

Students of International law have ever to remember the distinction which exists between the two meanings in which the word "domicil" is used, a difference which is well defined by the Civil Code of the Republic of Chile, which says (Arts. 60 and 61), "*Political* domicil refers to the territory of the State in general. . . . The constitution

and effects of the *political* domicil pertain to International law. *Civil* domicil refers to a certain part of the territory of the State." In the case of a National company all States require the civil domicil to be fixed and named in the constitutive instrument, and this *ipso facto* fixes the competence of the Courts of Justice, the fiscal responsibility of the establishment, and the law by which is determined the liability to third persons for contracts made or for wrongs suffered within the jurisdiction.

*The Treaty of Montevideo.*

In the year 1889 a remarkable advance towards uniformity was made by the Republics of Argentina, Chile, Paraguay, Bolivia, Peru, Brazil, and Uruguay, in signing the Treaty of Montevideo on International Commercial law, a treaty of the highest importance, which aimed at solidifying the common aspirations of those countries, as expressed thereby in the following terms:—

TITLE II.—ASSOCIATIONS.

Art. 4. "The contract of Association is governed, both as to its form and the juridical relations between the members and between the association and third persons, by the law of the country in which the association has its commercial domicil.

Art. 5. "Associations which have the character of a juristic person, shall be governed by the laws of the country of their domicil. They shall *ipso facto* be recognised as such in the States, and qualified to exercise civil rights therein, and to promote their recognition before the tribunals.

"But for the performance of acts comprised in the object of their institution, they shall be subject to the provisions enacted in the State in which they propose to realise them."

Art. 6. "Branches and agencies which are formed in a State by an association which is centred (rooted) in another

State, shall be deemed to be domiciled in the place in which they function, subject to the jurisdiction of the local authorities in all that concerns the operations which they effect."

Art. 7. "The judges of the country in which the association has its legal domicil, are competent to have cognisance of the actions, which arise between the members, or which are commenced by third persons against the association.

"Nevertheless, if an association which is domiciled in one State, effects operations in another State, which give occasion to legal disputes, it can be sued before the tribunals of the latter."

Art. 35. "The judges of the commercial domicil of the insolvent are competent to have cognisance of the bankruptcy proceedings, although the person declared bankrupt casually performs acts of commerce in another Nation, or maintains therein agencies or branches which act on the account and responsibility of the principal house."

Art. 36. "If the insolvent has two or more independent commercial houses in different territories, the tribunals of their respective domicils shall be competent to have cognisance of the bankruptcy proceedings of each of the houses."

So that this Treaty speaks in two or more Articles of the commercial domicil, a term which is not generally found in the Commercial Codes, in others it speaks of the legal domicil, then again of the separate domicil of branches and agencies, no doubt meaning thereby the civil domicil.

*How companies function.*

In order to ascertain the juridical position of foreign companies, it is necessary to attend to the mode in which they function, as there are at least four different modes.

*First.*—The company remains entirely within its country of origin, carrying on trade by means of correspondence and

casual agents: a right which is conceded by all civilised countries without any special laws or provisions, although in Art. 285 of the Commercial Code of Argentina, and in Art. 299 of that of San Salvador, the right is expressly conceded.[1] I do not propose to further consider this mode.

*Second mode.*—By its constitutive instrument or under the authority of proper resolutions, the company fixes the administrative centre of its business in a foreign country. It is clear that this does not involve a change of nationality or of political domicil; for the association is the creature of the law of a determined State, a law which is confined to nationals and which has no power to authorise foreign associations. A society which is constituted in one country is an entity which differs *in toto* from one constituted under the law of another country, as regards many particulars which relate to the members *inter se*, and to the association as possessing rights or as subject to obligations. For example, as respects the rights of married women, of minors, of the minority of shareholders, of the powers of the directors, there exist important differences between the British law and that (*e.g.*) of the Republic of Argentina. The jurisprudence of the Courts of Justice differs also as regards the powers of the company itself and those of the directors towards the company.

When, therefore, the administrative centre of a company is fixed in a country different from its country of origin, neither its political domicil nor its nationality is changed; but it does adopt a new civil domicil which it did not before possess, and to that extent becomes subject to the laws thereof so far as they do not refer to status or legal capacity.

I am aware that there are opinions of certain jurists to the contrary, among whom figures Professor Manuel Torres Campos in his *Elements of Private International Law*, p. 370,

[1] See, too, the Commercial Code of Cuba, Art. 15.

where he says: "The nationality of an association is determined by the seat of the association, and the principal establishment, that is to say, the centre of operations fixes this seat, which may be different to that established by the contract of association." It is not in my view possible to separate nationality and political domicil.

By way of following out this concept in the case of a company formed in a foreign country for functioning in Argentina, the Commercial Code in some circumstances treats it as a national company. In all probability there would exist a desire to avoid the inconveniences of the Argentine law in the matter of taxation. Art. 286 says (it is in truth an obscure article): "Associations which are constituted in a foreign country for the purpose of carrying on their principal trade in the Republic, with the greater part of their capitals raised therein, or with their central directorate and members meeting therein, shall be considered national associations for all purposes and subject to the provisions of this Code."

The following provisions of the Commercial Code of San Salvador are very similar, but wider: "Associations which propose to become constituted in a foreign country, but which must have their domicil in the Republic, and exercise their principal operations therein, shall for all purposes be deemed to be national associations and subject to all the provisions of this Code." (Art. 300.)

These Articles provide a more convenient remedy than that adopted in France for avoiding an evident grievance, as certain foreign companies which were constituted abroad for avoiding the fiscal inconveniences of the French law were held to be null and void. I refer particularly to the companies which were founded by MM. Horlaville and Rochette respectively.

It is unnecessary to say that foreign companies which are formed for the purpose of effectuating illegal operations,

whether in breach of the principles of public order or of morality or of a special law, will be treated as void associations in the country of their evil operations.

*The Third and Fourth modes.*—I cannot do better than repeat the 8th Article of the Treaty of Montevideo, now adopted by so many South American States, as it embodies the principle of the secondary or civil domicil; or alternatively, the branch or agency is regarded as having a civil domicil; and further, if there is more than one branch, each branch is regarded as having a civil domicil of its own. The Article runs as follows: "Branches and agencies formed in a State by an association which is centred in another State, shall be deemed to be domiciled in the place where they function and subject to the jurisdiction of the local authorities in all that concerns the operations which they carry out."

It follows from this, that an association may have more than one civil domicil in a State, and in this case legal proceedings may be taken in any one of them, unless they concern matters which have special relation to one only of such domicils.

The Codes of many countries specially permit foreign companies to establish branches or agencies, provided that the creation of such local establishments and their local trade operations are to be subject to the local law and to the jurisdiction of the local Courts.

Certain formalities have to be observed before the branch or agent begins working; thus, in general, the company, branch or agent, has to apply for and receive the authorisation of the Executive, to be inscribed on the Register of Commerce, on proof by the Consular or Diplomatic representative of the country of origin that it has been lawfully constituted in that country, to register its contract of association and articles (alterations may also

have to be inscribed after approval by the Executive), its last inventory and balance sheet, and the mandates or powers of attorney authorising the branches or agents to act. When a company acquires real property, the purchase must of course be inscribed in the Register of Ownership. For the purposes of local taxation, it is desirable to allocate a special fund for the local exploitation.

Each State has some special requirements, which it would be tedious to reproduce here, and these may apply either to the recognition of companies or permission to their branches or agencies to operate.

When the foregoing provisions are not fulfilled, those persons who contract in the name of the company are jointly and severally liable for all the obligations contracted by them in the respective Republics.

In Argentina representatives of foreign companies are declared to have the same liability towards third persons as the administrators of national associations. (Code Com., Art. 287.)

Many countries require foreign associations which possess or which may acquire undertakings of a permanent character in their territory, to appoint a duly authorised representative in the principal local seat of their trade, such representative being appointed by power-of-attorney and having the powers of an agent and the same *locus standi* as a manager in such judicial controversies as may occur, and for business established in the country. (See Colombia, Legislative Decree (1906) No. 2. The Law, No. 37 of the same year, amplifies the provisions. See also the Bolivian Decree of 25 March, 1887, and Com. Code, Art. 96.)

Assuming that a company has observed the formalities necessary for legalising its position in the country, it remains shortly to consider in what general matters it has to conform to the local law when there is no special

provision to that effect. It is impossible to state these exhaustively, but it may be mentioned that it must attend to the law as to the purchase, sale, mortgage, and registration of land; to all the local regulations which govern the mode of working, such as the mining law and regulations; the laws for the protection of workmen, and to the Revenue laws of all kinds; to the laws relating to contracts and wrongs—in fact, to all laws except those that govern status and personal capacity. There seems to be little doubt that foreign companies are bound to conform to such provisions of the Commercial Codes as determine the manner of keeping local accounts, of publishing balance sheets, &c.

Several countries have special legislation with respect to insurance companies, and besides the usual requirement of registration of the constitutive documents and the powers-of-attorney, oblige foreign companies to invest a certain portion of their cash capital in local securities, or else to form a local guaranty fund for the security of local policies, and to submit every matter concerning local contracts to the jurisdiction of the local tribunals exclusively.

All States require the publication of the annual accounts, and that in the course of the year certain returns should be made to the authorities.

It is a common thing to find a special provision applied to insurance companies, requiring them to obtain the authorisation of the executive power before establishing agents in the country for the purpose of representing them therein. Neglect to comply with this provision makes the agents personally liable for the performance of the contracts made by them, and in some cases for infringing the constitution of their company.

By the law of Colombia, the insurance is governed by the law of the country of the insurers, when they have merely agents in the State. (Colombia, Code Com., Art. 703.)

The legislation* of the Republic of Chile is one of the most complete, and besides the requirements mentioned above, it insists on local agents obtaining the authorisation of the President of the Republic, subject otherwise to the criminal liability of the agents under Art. 467 of the Criminal Code, whereby persons obtaining money under such circumstances are punishable for fraud. An annual licence must be paid for. Foreign companies are deemed to be domiciled in Chile, and their local agent is constituted the judicial representative of the company for the purpose of suing and being sued.

Other States have made enactments on the same matter; thus, by the law of 14 April 1904 of the State of Paraguay, it is provided that:—

Art. 8. "Contracts for insurances referring to land and carriage by rivers or inland waters are governed by the law of the country wherein the property, which is the subject-matter of the insurance at the time of its solemnisation, is situated."

Art. 9. "Marine and life insurances are governed by the law of the country wherein the insurance association is domiciled, or wherein its branches or agencies are domiciled in the case provided for by Art. 6."

Art. 10. "The tribunals of the country wherein the said associations have their legal domicil are competent to have cognisance of claims brought against insurance associations. If such associations have formed branches in other States, the provisions of Art. 6 shall govern" (*i. e.*, the law of Paraguay).

It will be known that in 1912 the Legislature of Uruguay passed a law making insurance (other than maritime insurance) a State monopoly. The State institution has been constituted and is in operation, but the foreign insurance companies have not been required to shut their doors, and

this in consequence of a strong diplomatic representation from the British and French Governments which stated that they would support the claims of their citizens. The Republic of Guatemala reserves the right of withdrawing the licences granted to foreign insurance companies on giving six months' notice. (Code Com., Art. 22.)

*Issues of Shares and Bonds.*

In some countries, as for instance in Mexico,[1] issues of shares, cedulas and bonds by associations of all kinds, have to be entered on the Commercial Register, with particulars of series and number of the certificates of each issue, their interest and redemption, the total amount of the issue and the property charged with the payment thereof (if any).

In Mexico, also, provision is made by which the foreign issue of bonds by associations which are established in the Republic will only be effective therein when they combine the following requisites: that proper proof is given that in the external form and solemnities of the contract authorising the issue, the law of the country of its execution has been observed, and that the issue itself has been made in accordance with the law of the country where it was made. The contract must be enrolled and inscribed or registered in the Commercial Register, and if the bonds are secured by a mortgage, this must be registered under the laws in force.

The obligations and rights arising from the contract will be governed by the law of the place of its execution, provided that it is not opposed to the Mexican law prohibiting the contract or to public order, although the contract is to be carried out wholly or partially in the Mexican Republic, unless it is expressly agreed in the contract that it shall be governed by the Mexican law.

[1] Code Com., Art. 21.

Obligations which are secured by mortgage of immovable property situated in the Republic will be governed by the Mexican law in all that is material to the mortgage security.

The Mexican Tribunals are competent to take cognizance of all resulting disputes. (Law of 4 June 1902.)

It should be borne in mind that in some countries the issue of irredeemable bonds is illegal, as stated, for instance, in Art. 37 of the Constitution of the Republic of Colombia.

On 13 February, 1912, a law was passed in the Republic of Argentina regulating the issue of debentures by national associations, being either limited companies or limited partnerships with share capital. Art. 30 refers to debentures issued by foreign associations and enacts: "Associations which are constituted abroad, which issue debentures with a floating charge, affecting property situated in the Republic, must proceed to register within six months reckoned from the date of the issue, in the Public Register of Commerce of the Federal Capital, the contract of loan to which the issue of the debentures is due, or from which proceed the amount of the debentures issued and the securities granted in favour thereof, on pain of such securities being inoperative in the Republic. If the property of the association is exclusively situated in the territory of a single province, the inscription shall be effected on the Register of Commerce pertaining thereto.

"Every issue of debentures with a security which is not limited to a security on determined property, shall be deemed to be issued with a floating security. If the security is special, it must also be inscribed on the Register of Mortgages, where the property affected is situated. The inscriptions mentioned in this Article shall be effected on the application of the associations, of the trustees, or of any debenture holder. Failure to comply with these provisions shall be punished by a fine of one thousand *pesos*, national

money, for each month's delay, to be borne by the debtor association."

The three Articles following regulate the form of the bonds and the particulars to be contained therein.

In conclusion, it may be useful to recall to memory the meeting of the Pan-Anglican Congress at Rio de Janeiro in May of last year, which was adjourned for further instructions from the Governments represented thereat. The object of the Congress was to continue and extend the results obtained by the Treaty of Montevideo. It is important for the jurists of Europe to associate themselves with their Ibero-American brethren, in suggesting amendments in Private International law, as otherwise at least two different systems will be adopted on many subjects with regard to which it is desirable to obtain unanimity.

## VI.—THE INTERNATIONAL LAW ASSOCIATION: MADRID CONFERENCE, OCTOBER 1913.

During the forty years which the International Law Association has been in existence, it had not until the recent conference visited Spain. An invitation to visit the country of Cervantes and Ximenes was conveyed to the Association last year at Paris by Sr. D. Avelino Montero Villegas, late Under-Secretary of State; it was accepted with great satisfaction, and the meeting took place in October last. The President should have been the late Sr. Canalejas, to whom the invitation was in the first instance due. His assassination made it requisite to elect another chief: and the fortunate choice was made of the Marquis of Alhucemas, the leader of the Dissident Liberals, who not only accepted the position, but devoted himself energetically to promoting in every way the success of

the gathering. All the sessions were presided over by the President in person, and with the utmost tact and despatch. Considering the difficulties of language, this was a perfect *tour de force*, and makes it easy to conceive how the Marquis succeeded in negotiating the Franco-Spanish Treaty. Some fifty English-speaking members attended, and about as many from the Continent, including a strong Dutch contingent headed by Asser's successor, Dr. Jitta. Among the English members were Lord Justice Kennedy, Lord Justice Phillimore, Rt. Hon. Sir F. Pollock, Sir Graham Bower, Sir Erle Richards, Mr. W. F. Hamilton, K.C., Mr. G. S. Robertson, Chief Registrar of Friendly Societies, Mr. G. G. Phillimore, Mr. J. A. Barratt, and Mr. R. S. Fraser. Others present included Mr Clunet, Prof. Niemeyer, M. Maeterlinck, M. Langlois and M. Van Péborgh, Sr. Rebello, Brazilian Chargé d'Affairs at Lisbon, and Sr. Vielmann, representing the Advocates of Guatemala. Almost all of the Spanish provincial colleges of advocates sent representatives, and the attendance must be regarded as very satisfactory.

After an eloquent inaugural address by the President, eulogising the late Premier so tragically cut off, and dwelling upon the glories of Spain in the early history of International law—Ayala, Vittoria, Suarez—the subject of International Arbitration was, as usual, first taken up. Dr. Evans Darby (Secretary of the Peace Society) had prepared a careful summary of the incidents regarding Arbitration which had taken place during the past year. This was read by Lord Justice Phillimore, as Dr. Darby is at present in Canada engaged on a mission of propaganda. A young Dutch jurist, Dr. Hartzfeld, presented an interesting statement, entitled, "Judgments of Solomon at the Hague," the object of which was to vindicate the tendency of the Hague Court to render compromise decrees. According to M. Hartzfeld, this is an advance on the ordinary conceptions of Civil law—no litigant can be wholly right or wrong, and therefore a compromise is

the ideally perfect decision. The older school of thinkers attacked this thesis; but it gives food for thought.

The next topic to be brought up was that of General Average. This needs, perhaps, a little explanation. The most conspicuous success achieved by the International Law Association has been the establishment of the so-called "York-Antwerp" Rules for the adjustment of General Average, *i.e.*, the recoupment of persons whose property has been damaged or lost at sea for the safety of the joint adventure. These Rules are facultative; but they are generally if not universally adopted. Three years ago, however, Chancellor Dowdall, of Liverpool, moved for the appointment of a committee which, without trenching on the work of a committee which was already examining the possibility of introducing improvements into these York-Antwerp Rules, should examine scientifically the basis of the whole theory of General Average. This Committee compared the laws of various countries, and reported the result in 1912: and it now brought up a Model Law of General Average, asking for its approval by the Conference on behalf of the Association. This was taken exception to by many Average Adjusters present, as tending to supersede the York-Antwerp Rules by a hard-and-fast code of law; and one which, moreover, members had had little opportunity of considering. On the other hand, it was urged that to refuse immediate approval would be tantamount to throwing the work of the Committee away. In the result, it was agreed by a substantial majority to approve the Draft Law provisionally, and to refer it to the Committee for report to the next Conference with any improvements which might occur to them.

The question of the effect of the outbreak of war on private contracts, and in particular upon maritime insurances, was taken up at some length. Dr. Brüders, of Berlin (Secretary of the International Transport Insurance Union), differing from Dr. Sieveking, of Hamburg,

opposed the traditional British view, which was upheld by Sir Erle Richards in an able speech. Prof. Niemeyer (Kiel) and Dr. Loder (Amsterdam) supported Dr. Brüders: but the difference of opinion was so marked, and the question so fundamental, that the further consideration of the subject was deferred to next year on the proposition of Kennedy, L.J., who expressly reserved his opinion as to the legality or otherwise of the voluntary payment of insurance liabilities towards enemy subjects whose vessels may be captured by our fleet—a proposal which has been propounded by Sir E. Beauchamp. On the broader question of the general effect of the outbreak of war upon private relations, a remarkably suggestive paper was presented by Prof. Van Eysinga, of Leyden.

The Conference heard with pleasure of the efforts made by its Committee on Deck Cargoes to secure the safety of life at sea by some system of concerted legislation on the dangerous cargoes of heavy wood which are brought across the Atlantic loaded on deck; and M. Sans-Castaño, of Barcelona, detailed the regulations which have already been provided in Spain on the lines of the British. It is hoped that the United States, as the main country of export, will be in a position before long to legislate on the subject; and the Committee were asked to continue to bring the matter to the front.

Useful papers were read on Mining Law in Spanish countries, by Mr. B. Barrios, of the Mexican, Spanish and English Bars, and Dr. Cabello y Guillen de Toledo; and on the position of Foreign Companies in Spain, and generally, by Mr. Wyndham Bewes, London, and Prof. F. Baumgarten, Pesth. It should be added that Mr. Bewes summarised in English most of the Spanish papers,[1] and that Dr. Barrios was responsible for the whole of the preliminary arrangements for the holding of the Conference.

[1] See p. 76, *post*.

On Foreign Judgments and Arbitral Awards, Mr. R. S. Fraser read a paper recommending the introduction of some system of enforcing awards passed in foreign arbitrations. It was resolved to refer it to the Committee on Foreign Judgments to consider the practicability of this. Dr. Illés Hevesi (Pesth) contributed a paper lucidly explaining a recent Hungarian statute which was passed after mature examination of the subject. It recognises to a certain extent the principle of reciprocity, and some of the speakers observed upon this that justice ought never to be conditional upon reciprocity. *Fiat justitia ruat cœlum:* justice must not be withheld from a litigant as a means of putting pressure upon his State to do justice in its turn. On the whole, that is a more respectable maxim than *Do ut des.*

Two papers recommending drastic international action in industrial legislation were the work of Messrs. Scott-Duckers and Ruiz Funes. They seemed to assume agreement as to the value of restrictive legislation. Until that is admitted by South America, South Africa and Japan, there is little likelihood of combined effort in this direction.

Mr. E. Todd's Committee on Comparative Civil Procedure and Evidence had collected from twelve countries a mass of most interesting information, which had been carefully digested in a short space, and gives in tabular form a valuable account of the rules prevailing on an important department of practical jurisprudence. This report, and that of Mr. J. A. Barratt's Committee on Divorce Jurisdiction, do great credit to the Association. They collect an amount of material which is nowhere else to be found, and they should prove of great service to lawyers and legislators everywhere. The former report remains open for the consideration of its conclusions; but the Divorce Committee has now completed its work, and Mr. Barratt, the convener, was heartily congratulated on having

brought it to a successful termination, and on obtaining his "divorce from Divorce." M. Fortunato (Naples) presented some rather extreme propositions regarding divorce, which proved too advanced for the Conference to accept.

M. Lucien Coquet (Paris) presented a paper on the Madrid Arrangement of 1891 regarding the suppression of false descriptions of origin; the writer recommended that commodities should no longer be liable to be virtually excepted from the operation of the Agreement owing to their names being held to be merely descriptive of their nature and quality (and not of their *provenance*), such as "Seville" oranges. Dr. Rives (Madrid) advocated the control of interlocutory proceedings by the Courts, but met with opposition from Dr. Vielmann (Guatemala). On the topic of Extradition, Prof. van Hamel (Amsterdam) advocated the view that the practice of getting accused persons to waive objections to their extradition is improper and illegal. Dr. J. G. Peman y Maestre, representing the Cadiz College of Advocates, urged the necessity of strong measures against violent anarchists. Mr. Whitelock, of Baltimore, gave an interesting account of the new American model law (adopted in ten States) making bills of lading perfectly negotiable instruments.

The Law of the Air produced a lively debate. The report of the Committee, appointed at Paris, was read by Sir Erle Richards in English, and by Mr. Perowne in French. It recognised that the divergence between the school of thought which affirmed the sovereignty of territorial power *usque ad cœlum*, and that which asserted the absolute freedom of the air-space, was too marked to admit of compromise in principle. The report invited the Conference to approve the former principle, which, after speeches by Sir F. Pollock and others, it did by a very large majority. But it was referred to the Committee to consider fully the question of

how the admitted desirability of encouraging the innocent transit of air-ships could best be given effect to. Mr. Henry-Coüannier offered a practical paper on "Airships in Territorial Waters."

Turning to Private International Law, the Conference had a luminous paper from Prof. Jitta on the accession of Great Britain (and other countries) to the Hague Private Law Convention. Admitting the co-existence of nationality and domicile as criteria of the personal statute, he pointed out that there were three possible courses to take. Either (1) for each country to apply its own ideas, or (2) for domicile to be adopted as an ancillary and facultative criterion only, or (3) for the conceptions of domicile and nationality to be fused. Short of this third event happening (and there are signs that it is not unlikely), we cannot see how countries of domicile can possibly come into the Hague system, which is based entirely on nationality, though this was advocated by Mr. Kuhn (New York). Dr. Marin (delegate of the College of Advocates of Saragossa) read a masterly paper on International Administrative Law, which should form a landmark for pioneers in the discussion of the subject; and M. Lasala Llañas (also of Saragossa) wrote on the Unification of the Law of Bills of Exchange. The Conference expressed its desire to co-operate in the efforts which are being made to introduce a uniform rule of the road in view of the great international development of motor traffic. Racial law formed the subject of two papers:— Mr. Bentwich urged that the Courts should definitely recognise the Jewish law as a system of personal law on the same footing with territorial laws; and Mr. Wyatt Paine gave a most learned account of the sources of Mohammedan law. Lastly, M. Kriegelstein (Mülhausen) contributed an acute analysis of the difference between obligation and liability, and traced its bearing on Private International Law.

The social arrangements passed off with *éclat.* They comprised a visit by special train to Toledo, with lunch, at the invitation of the Government; visits to the Madrid Museums, where the Minister of Education received the party; a concert by the City Orchestra of 100 performers; a subscription dinner; and two brilliant receptions at the Law Courts and at the City Hall respectively. At the latter the stairs were lined by alguazils in the picturesque costume of Velasquez's time. His Majesty the King was also pleased to receive the members of the Congress individually, and in order that the ladies might have an opportunity of visiting the Palace, H. M. the Queen was so gracious as to make an exception to the usual rule and to accompany King Alphonso. Both royal personages charmed those who had the honour of conversing with them. At the close of the Conference an official invitation was extended to the Association to hold its next Conference in Holland in August or September 1914; and, on the recommendation of the Council, this was accepted.

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## Spain's Contribution to the Conference.

For the first time in the history of the International Law Association Spanish has been one of the languages spoken at a Conference, and papers in Spanish have been read. Considering that the meetings were held in Madrid, and the enormous extent of the globe populated by nations speaking the tongue of Castilla, the innovation was quite justified; though it is doubtful if any other languages than French and English will be permitted at future Conferences.

The papers contributed by Spanish jurists were of varied and considerable interest, and had been previously summarised in English for the benefit of the members unfamiliar with Spanish by Mr. Wyndham A. Bewes, barrister-at-law. We proceed to give the summaries, both for the value of

the contents of the papers and in homage to our Spanish *confreres* :—

*International Conventions for the Prevention and Suppression of Anarchism*, by JUAN GUSTAVO PEMAN Y MAESTRE, LL.D., Dean of the College of Advocates in Cadiz.

The learned Author began by calling attention to the operation of the laws of change and development in social ideas, and after a considerable introduction in this sense declared that it might well be discussed by the Conference whether the time had not come for positive law to give nations the necessary guaranty of their continued co-existence, founded on mutual respect for their own natural rights. To disregard the fact that the Social question is now engaging the deep attention of philosophers, statesmen and lawyers would be to shut the eyes to the light of evidence.

The collision between collective and individual rights has been latent or manifest in all ages, for while times, places, habits and customs may change, the substance remains the same. At one time, the inter-relation of different dominant doctrines may act as a check, and at another, may cause an overflow of force.

At the present time Anarchism is extended and worked through an association and a universal means of action. The action of the Public Powers is doubly necessary when the morbid process is developing and carries germs which endanger the existence of the whole organism. Heroic medicines are not always necessary, for great disasters often proceed from the abuse of great force. But here the "*science des temps*" agrees with Bacon when he advised: "*Verum tamen saepe necessarium est quod non est optimum.*"

Socialism and Communism, and subsequently Internationalism, were the origins of Anarchism. Doctrinaire Socialism and revolutionary Socialism neither deserve nor receive the same treatment, or our social foundations

would have been completely upset and force would have conquered ideas.

From the time of Bakunin and "La revolte," anarchist action has been incessant, until an immense net has been woven which extends over all nations alike and marks with black the pages of their history. At one time it was Hoedel and Reinsdorf in Germany, attempting the life of the great Emperor who was walking without suspicion in the Avenue Unter den Linden; at another it was Lipido in Brussels, who tried to assassinate one who was guilty of no crime but that of having the right to be called the Prince of Wales, the future successor to the Crown of a great people; on another, it was Luccheni assassinating a defenceless lady who was calmly walking by the shores of the Lake of Geneva, respected both for the weakness of her sex, for her birth, for her age, and for the nimbus of pain and sorrow which enveloped her, but who was marked by the stigma of the Imperial Crown of Austria on her brow. Even the ashes of Pio IX have not escaped profanation in Italy; the same Italy where King Humbert escaped the danger of an attempted murder—only to be the victim of Bresci when passing through Monza.

It would be too long to recapitulate the series of anarchist crimes in Russia; while in Spain, the misdeeds of Oliva and Angiolillo and many others, form a dark catalogue of crimes —crimes from which even the American Republics are not exempt.

To sum up, the Author stated that no one is unaware that anarchism is directed to the suppression of all the bases of the social edifice, and declares itself in opposition to all family ties, all ideas of fatherland, all principles of authority, all rights of property, religion and law. Its means of action are the destruction of everything by force through the common action of the universal Federation, the social revolution, already consecrated at the Geneva Congress of

1866. This involves an attack on the Law of Nations, the natural law which all nations are bound to defend *inter se* in their international relations, and it is evident that a positive international law is required to support and guarantee it.

The world-action of anarchism generally incites in one country a crime to be executed in another, or to restrain or prevent the punishment or repression directed therein. International law must intervene to re-establish public international order, which is disturbed by such acts, and to repress the organisation of criminal acts which it would not tolerate if they were to be carried out within the country.

The learned Author proposed that the following resolution should be passed :—

1.—That all meetings of an anarchist character should be prevented and punished, together with all writings and measures of propaganda, whereby means are counselled or encouraged for perpetrating offences in a foreign Nation, or whereby it is endeavoured to prevent or restrain freedom of action in repressing and punishing crimes committed in the territory of another Nation.

2.—That extradition of its nationals against whom the action of justice is directed for crimes of an anarchist character, and wherein such nationals appear to be implicated as shown by reasonable evidence, ought to be established as a fundamental and necessary proceeding, when requested by any other country.

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*The Social Problem as viewed by Public International Law*, by MIRIANO RUIZ FUNES, LL.D., Member of the College of Advocates in Murcia.

The learned Author, after laying the foundation for his paper by discussing principally the economic aspect of the relations between capital and labour and the necessity of

law progressing with the changes of life and ideas, said that there are three periods in all societies—the religious, the warring, and the industrial. In the third, individual rights yield to the collective, as governed by the morality of the end pursued. Liberty ceases to be negative and is transformed into the duty of accomplishing private ends for the benefit of the individual, the group, and, with greatest intensity, of the common cause. Mechanical solidarity gives way to the organic; the individual rises to become a member of a group. Modern science, in giving letters of naturalisation to the collective *persona*, as an entity independent of its members, but dependent on the morality of its objects, endows this collective relation with the advantages of life.

He then discussed the modern concept of social classes. The function of a State was to protect or crush the classes in their warfare, according as it was moved by ambition or fear; while the struggle for supremacy prevented amalgamation into one supreme community with moderate ideals. But in our days the idea of the protection of warring interests has been modified, and the theory of a collective *persona* protected by law, with a will of its own and directed to lawful objects, has arisen. The class has evolved into the group or association, more heterogeneous and complex, and therefore less rigid in its social movements. Its members are more closely united by ties of affection and sentiment and common ideals, which are more durable and more moral than interest, but still compatible therewith. The old static organisation becomes dynamic. The idea of the whole replaces the concept of the nucleus.

In the course of modern evolution the rights of property are now subordinate to the duties of property. The Roman *dominium* which inspired the modern Romanist Codes involved the inviolability of property, corresponding to the mechanical concept of class of which mention has been

made. Property itself may be either non-productive or reproductive, the latter having the idea of duty more clearly defined.

The interdependence of groups and their general objects constitute the ethical aspect of the rights of ownership, and thence are derived collective duties, which involve the collective obligations of property to bear the detriment caused to another group or individual. There is no clear separation except as a concept, between capital (or accumulated labour) and labour, between which extreme ideas there are many intermediate conditions and many conditions which are outside all groups and protection.

The learned Author then called attention to the laws protecting workers, and especially women and children on the economic side, the respective provinces of Public and Private International Law, and the bases for the solution of conflicts of laws, and the agencies whereby this is effected, viz.: judges, jurisprudence, and treaties. For instance, authors who discuss this science refer the juridical regulation of ownership to the principles of the *estatuto real*, which embraces the whole condition of movable and immovable property—the *lex loci rei sitae*.

Modern Codes are limited to guaranteeing the rights of property, with few exceptions, such as the German; the Servian, which forbids the misuse of these rights and punishes the non-performance of owner's duties by the loss of the thing possessed; and the Austrian, which declares uncultivated property to be *res nullius*.

It is impossible for International Law to soften the asperities of the war of classes by applying absolute theories. It is important that more modern principles should be adopted in Treaties and Conventions. The international regulation of labour has long been foretold. It is not chimerical, but has been realised to some extent by Switzerland, where the Federal Council, in 1881, passed a proposal of

General Frey to open diplomatic negotiations with the principal industrial countries for the creation of an international system of law on the subject of factories. An International Conference took place in Berlin in 1890 without successful results. Later on the International Association for the Protection of Workmen was established.

Little has been effected for their legal protection by international practice, but in the realm of speculation a new departure has been taken with reference to the juridical position of foreign workmen (which the Author claimed to be part of Private and not Public International Law). Two works have been published, one by M. Raynaud, of Liege, and the other by M. Mahaim, of Paris. The latter claims that the uniformity attained in different States makes possible the internationalisation of principles on immigration and on the position of immigrant workmen before the local laws for their protection, and suggests that if the law of the nation of the workmen is the more advantageous to him, that should be the one applied. An appendix contains such Conventions as have been promulgated up to this date.

After discussing the theories in vogue and mentioning their origin in the Socialist party, the Author declared that they have now lost their political character. Almost all students have declared for international regulations, and the Author advocated treaties confined at present to protecting the labour of women and children in their own interests and those of the human race. As regards the labour of adults, he thought that regulations for the *minima* of health and wages might be established.

The limitations which he advocated in the rights of a certain class might injure absolute economic rights in part, but they favoured moral interests, which are above riches.

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*The Mining Laws of Spanish Countries*, by ALFONSO CABELLO, Member of the College of Advocates in Madrid.

The learned Author commenced by giving a sketch of the historical development of the Mining law of Spain itself, and traced the varying concepts under which the property in mines was regarded. Thus, in the early Roman times the owner of the surface owned also the underlying mines, while in the time of the Empire the State was the legal owner and let out its property to *publicani*. Little is known about the matter during the times of the Arab domination, though at the end of the tenth century the Kaliph of Cordoba received large sums from the mines of precious metals. The early Christian kings took a head-rent and at the time of the Fuero Viejo (about 1138) the principle of Crown ownership existed in full vigour.

Salt pits and mines were similarly treated in the Ordinances of Alcalá of 1348, reserving, however, the rights of owners with immemorial titles.

Doña Juana, acting as Regent for her brother Phillip II, reincorporated all mines previously given away by the Crown into the Royal domain, and in 1563 a law was made regulating the discovery, working, and profits of mines, which remained in force for 241 years. These Ordinances afterwards formed part of the *Novísima Recopilación*.

During the government by the Cortes mines were declared free, but this was again changed on the restoration of Ferdinand VII, who re-established the older system by the Royal Decree of 1825, which formed the basis of the Mining law of Spain during the nineteenth century. This was superseded by the law of 1849, which transformed the right of the Sovereign into the right of the State. Interrupted by a short interval of a few months, during the revolutionary times, the State ownership was re-enacted by the law now in force of 1868.

Certain mining ordinances were passed for the New World in 1541 and 1543, and in 1584 Phillip II applied his Ordinances of that date both to the Viceroyalty of New Spain and Peru. In 1783 the Ordinances of Mexico were passed which formed a complete mining code. These were based on the legislation of Germany, and declared all mines to be the property of the Crown, and contained directions for good order, inspection, working, unwatering, etc., with provisions for confiscation on non-working. The formation of companies was stimulated by the concession of certain privileges, and a bank was established for the equipment and service of the mines, while a Mining Tribunal and a school for young miners were also set up.

The general law is to be found in the law of 1859, as amended by that of 1868 and the Decree of the same year, and as completed by the Regulations of 1905 and the Royal Decrees of 1909 and 1912. The rights of the individual and the State vary with the contents of the mine, the former being always subject to the payment of a head-rent of fifteen *pesetas* per *hectaria*, and to 3 per cent. of the raw output, for the precious metals and lower charges for the inferior. The law of 1910 made the head-rents payable at one time within the calendar year instead of by quarterly instalments. Many properties were exposed to forfeiture, but the difficulty was overcome by the Royal Decree of 10th September, 1911, requiring notice to be given to the owners in default during the month of November. It is suggested that this Decree is illegal, as derogatory of the statute law.

Subject to due payment of the head-rent, the concession may be enjoyed in perpetuity, with certain rights of expropriating the surface-owner for necessary mining operations. He has, however, a prior right of working the subsoil himself.

Many laws and regulations have been passed to safeguard workers and to protect the interests of women and children. By the law of 27th December, 1910, and its Regulation,

underground labour was restricted to nine hours and above-ground to ten, six hours underground when the temperature is 33 degrees and in the mines of Almaden, where women and young persons under sixteen are not allowed to work underground. By the law of 18th July 1907, the truck system was abolished.

The learned Author next passed in review the divers laws passed for the internal economy of mines, which are too numerous to be summarised here, but he justly concluded that, subject to such defects as are common to human affairs and to future improvements, the legislation of Spain is as complete as can be wished, and is in perfect harmony with the counsels of science and experience.

The Author then proceeded to mention the administrative bodies of State mining engineers and the special school for mining engineers in Madrid.

The tendencies of modern law were then discussed at some length, in particular as applicable to Spain, the Author specifying the States of the world where the different systems of ownership and exploitation prevail, according to whether they adopt the right of accession or State ownership, or treat them as *res nullius*.

He then mentioned the new Bill for a Mining Code in Spain, which, among other changes, seeks to confine mining concessions to Spaniards and Spanish companies, the latter allowing foreigners to become shareholders. It is also proposed to limit the area of concessions, and to secure that the concessionaires do in fact work the mines efficiently within a reasonable time, to alter the law of expropriation, particularly so as to prevent extortion by surface-owners and unreasonable delays. It is also proposed to abolish the previous necessity of obtaining a declaration that the mine would be of public utility, except in cases wherein the actual use of the surface is more beneficial than that to be expected from mining. The price proposed is three

times that declared by the owner in his relations with the State in the case of total expropriation, and five times in partial.

The learned Author concluded by calling attention to the main provisions of the draft Code of Mining, which, besides co-ordinating existing laws, contains certain innovations in addition to those noticed above. It grants the privilege of association, regulates the right to strike and lock-out, and allows the existence of piece-work, permits of the creation of workmen's inspectors, places the department under the Minister of Fomento instead of the Treasury, obliges masters with more than 100 men to contribute to their welfare by associations of mutual aid, schools, old-age allowances and sick pensions, and authorises the men to form co-operative societies. The fiscal laws are greatly modified, the taxes being confined to the head-rent and a single tax on the raw material and the profits—exported raw material being also subject to duty. When this Code is adopted, the law of Spain will be among the most complete and advanced in the world.[1]

*Deck Cargoes of Timber*, by RICARDO SANS, Member of the College of Advocates in Barcelona.

The Author stated the desirability of uniformity among maritime nations on this subject. He mentioned that, owing to excessive dead weight, vessels not unfrequently arrive with their decks awash: while the fact of all spaces being filled with cargo makes the working of the vessel difficult. Storms are apt to fracture the stanchions and burst the lashings, with the result that the cargo gets adrift and the vessel has a dangerous list.

The only two nations which have as yet legislated are the United Kingdom and Spain, the present law of the

[1] The paper in English by Dr. Benjamin Barrios, barrister-at-law, dealing with the mining laws of the various Spanish speaking countries, is not well adapted for condensation, but deserves to be procured and read in full.

former country having been passed in 1906, while the law of the latter was passed last year (but is as yet in suspense by virtue of the Royal Order of 17th June last).

The loading of such cargoes as ore and cereals should also be regulated. The loss of life and ships in these three categories is quite disproportionate. The season of the year to which the law now applies is from 31st October to 16th April, but no exception should be made as dangerous storms arise at other times.

No individual nation has a right to penalise the vessels of other nations trading to her shores; nothing less than an International Convention can authorise this. Nations can only legislate for their own flag.

It will be a difficult and very complicated matter to arrive at an International solution, but the Author made the following proposals:—

1. Merchant vessels should carry an outside mark of the limit to which they may be submerged.

2. Exit from a port should be absolutely prohibited when this mark is submerged in calm water.

3. Arrival at a port in like conditions should be punishable by fine.

4. For breach of the law there should be a single penalty to be inflicted by the competent authority, either on the sailing or arrival of the vessel, viz.: 10 shillings per registered ton when the mark is submerged one foot or more in calm water, and 5 shillings when the submergence is less.

5. Deck cargoes of all kinds should be allowed when they do not occasion danger to navigation or difficulty in working the vessel, in the opinion of the authority of the port of sailing, assisted by experts.

6. When the vessel is overloaded, the necessary quantity of cargo should be discharged, under certificate of the harbour-master, assessors, and consul of the nation of the vessel.

7. The certificate should state the time taken for these operations so as not to be reckoned in lay-days.

8. Non-signatory nations to be free from international restrictions, except when their vessels have taken on board cargo in the port of a signatory nation.

9. Signatory nations to make the necessary regulations to carry out the law and for application of fines; such regulations to be submitted for the approbation of the other signatory nations.

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*International Administrative Law*, by JOSÉ GASCON MARIN, Member of the College of Advocates of Zaragoza, Professor of the Faculty of Law.

The learned Author reviewed the nature and province of this law and discussed whether it in fact exists as a separate branch from internal law, concluding that it does so exist. He cited the principal contentions of several Continental authors of repute.

He preferred the name International Administrative Law to Administrative International Law. Its field of action, he said, is very extensive. One organic part thereof must of necessity be the study of how the Head of the State and the Minister of Foreign Affairs act in external polity, how the representatives of the State are appointed and exercise their diplomatic and consular functions, how the armed force acts for the defence of the national integrity, for the maintenance of the juristic personality of the State when it is attacked or injured, how other organs arise of a nature which has been much discussed, such as International commissions and how they tend to perform services required by International co-existence. The other part must be constituted by the study of the juridical rules to which the operation of International administrative services is subject, viz., police, property, action in defence of public morality, religion, instruction, ways of communication, international trade, &c.,

&c.; the former part being similar to public international law as generally understood, and in the latter there will arise questions of jurisdictional competence, the determination of national action towards foreigners, of the administrative status of the latter (now-a-days very distinct from the political), and of the position of the administrative organs with respect to nationals who are residing outside the territory of the State to which they belong. The learned Author closed by pleading for an increased study of this branch of International law.

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*Private Initiative in Civil Proceedings*, by FRANCISCO DE P. RIVES, LL.D., Master in the Courts of Madrid.

The Author discussed the advisability of shortening the usual civil procedure by completely abolishing applications by opposite parties to compel the other side to proceed when guilty of delay, which is now the rule in most cases, the procedure being by means of what is called *apremio*, or else by applications for actions to continue against defaulters *in rebeldia*. This is one of the chief reasons for the unnecessary length and expense of actions. The Author urged that it is desirable that, when once an action has been commenced, it should not be left to a party to compel his opponent to proceed, but that, terms for each step being fixed, the compulsion should be in the hands of the judge of the cause. At present the judge is like a cardboard figure which only moves when the strings are pulled. The original idea of the existing procedure was, that litigation was but a matter that concerned the individual parties, but this is not really the case. It also interests Society, and besides that, much of the delay is caused, not for the convenience of parties, but for that of their representatives.

Long ago things were worse, but this state of affairs was partly remedied by King Philip II in 1564, by a disposition which afterwards became incorporated in the *Novísima*

*Recopilación.* Many other countries have legislated by way of enacting that actions shall lapse if not properly carried on, but of this the Author disapproved. Under the guidance of the eminent jurist, the Marquis of Gerona, the progress of proceedings was committed to the Judges in the year 1853, but this was repealed after nine months for reasons foreign to the contentions of this paper.

In certain proceedings the law on the subject has been altered, *e.g.*, by the Regulation of 23rd September, 1904, applying the law of 5th April, 1904, on the civil liability of public functionaries. This is also the spirit, though not the text, of the Law of 19th May, 1908, for Reforming the Industrial Tribunals. Mexico, by Art. 230 of the Code of Civil Procedure, and Colombia, by Art. 511, have adopted the reform advocated.

At the present time a commission of great repute, consisting of Senores D. Eugenio Montero Rios, D. Victor Cobian, D. Luciano Obaya, and D. Avelino Montero Villegas, assisted by Señor D. Edelmiro Trillo, Member of the Court of Appeal, is studying the reform of the Civil Procedure and the consolidation of the law. The learned Author expressed the hope that the particular reform advocated by him should be adopted by the future Code.

*The Ratification of the Hague Convention of July 23rd,* 1912, *and the incorporation in the legislation of each State of the "Annexed Uniform Regulation" on Bills of Exchange and Cheques,* by MANUEL DE LASALA LLANAS, Advocate of The Territorial Court of Appeal of Zaragoza and Professor of International Law in the University.

On the proposal of Switzerland, the Contracting States undertook "to introduce into their respective territories, either in the original text, or in their National languages, the annexed Regulation on bills of exchange and cheques to order, which is to come into force at the same time as this Convention."

Difficulties have arisen over this novel method of proceeding. How are we to give to the Uniform Regulation the obligatory force of a true law? It cannot be by mere ratification of the Convention, as this would infringe Constitutional legislative rights. The Regulation must inevitably be approved by the Parliaments in the form of a law.

The Author rejected the opinion held by the German writers, Unger and Jellinek, that the ratification of Treaties involves their execution, and adopted that of Laband, to the effect that a special law must be passed in each State.

In such States as Spain, where a special law has to be passed authorising the Executive Power to ratify a named Treaty, the question arises, which bill must first be passed? M. Billet, of the University of Paris, argues that the Regulation should first be passed, and then the enabling bill. The present Author rejected this view on the ground that the Head of a State contracts undertakings which are essentially valid when he concludes a Treaty. This would also be in harmony with the modern tendency to make the State authority generally and independently competent in the matter of Treaties.

As it is not possible to give the Legislative Chambers the right of direct intervention in negotiating legislative Treaties, it is at least necessary for them effectively to participate in the formation of the contractual bond, that is in the conclusion of the Treaty. The way to do this would be to make a general rule that the Executive Power has no power to ratify a legislative Treaty without the previous consent of Parliament. The Author proposed that, in the first place, a Bill should be presented containing the whole text of the Convention: in the second place, one or more Bills should be presented comprising only such stipulations as require by their nature the approbation of the Legislature.

## VII.—CURRENT NOTES ON INTERNATIONAL LAW.

### Holstein.

Danish patriots have some ground for enforcing on British publicists the truth that if Great Britain had stood by her engagements at the time of the Prusso-Danish war of 1864, Kiel would not now be the head-quarters of the Imperial German Fleet. It is understood that only Queen Victoria's personal influence—(Bagehot was at that time styling her "a retired widow"!)—prevented British assistance from being afforded to Denmark on that occasion; in which event France would certainly have co-operated with this country. A singularly inept observation has been made that, but for the Queen's intervention, it would have been British, and not Austrians and Danes, who would have been mown down in 1864 and 1866 by the "needle-gun." On the contrary, there would have been no war. Austria and Prussia were too antagonistic to face a strong coalition (as was made evident in 1866). It is too often forgotten that in 1864 Denmark was strong enough to beat the Austrian and Prussian navies at sea off Heligoland. Ruskin, among others, lamented our failure to stand by the Danes. To-day we can only surmise what might have been; and gather what satisfaction we may from the fact that our course of action contributed to the formation of a strong and united Germany.

Holstein, of course, was German by language and race; and the title of the Danish king to the duchy was not unimpeachable. It is popularly supposed that only Viscount Palmerston and Sir Travers Twiss ever understood, or pretended to understand, "the Schleswig-Holstein question." Without inflicting a profound discussion of it upon the reader, it may be recalled that Holstein in 1848 and 1863 attempted to recognise as its Grand Duke, not the

King of Denmark, but Princes of Augustenberg. It will be remembered that Frederick VII of Denmark died in 1863 without a son to succeed him. The succession to Denmark was clear. The *lex Regia* set upon the throne the descendants of the monarch's aunt. It was contended in Holstein and Germany that Schleswig and Holstein must follow the Salic law and fall to a junior but masculine branch. This argument had a double aspect in respect of Schleswig—either (*a*) the Salic rule prevailed there as law or (*b*) it was necessarily followed there because Schleswig was indissolubly united to Holstein, where it prevailed. There seems to be some weakness in (*b*)—it might equally be argued that the indissoluble nature of the union made the Schleswig rule prevail in Holstein, or that the provision for the union of the Duchies was senseless and invalid. In fact, the whole difficulty arose from the union of the Duchies in 1460, whilst one (Schleswig) was a fief of the crown of Denmark, and the other (Holstein) a fief of the Holy Roman Empire. It was comparable to a proclamation which should have united the Channel Islands with the Isle of Wight, in the early Plantagenet period. Twiss rightly observes upon the "Act of Security" of 1460, that the King of Denmark had no power to make such an arrangement without the consent of the overlord of Holstein. He suggests that no such union or fusion was intended, and that the real meaning of the Act was only to secure that the duchies should not be subject to partition between joint-heirs. Such a power of partition was resident in the Lord of the duchies, and it is suggested that by the Act he resigned it. As regards Schleswig, the case, though simpler, is not perfectly simple. The duchy had two divisions, of only one of which was the King of Denmark originally the Royal Duke: of the other he was overlord, but its Duke was the Duke of Holstein-Gottorp. In 1658, he ceased even to be overlord, for he made over his sovereignty to

the Duke, reserving the reversionary succession. Consequently, we have three sections—Royal Schleswig, of which the King was Duke, Ducal Schleswig which was entirely in the hands of the Duke of Holstein-Gottorp, and Holstein, of which the overlord was the Emperor. But in 1713 the Danish King attacked Ducal Schleswig and annexed it to Royal Schleswig.

The Duke of Holstein-Gottorp was in 1721 allowed to retain Holstein-Gottorp, but not Schleswig-Gottorp. It was his constant object to re-acquire it. Having married the eldest daughter of the Russian Emperor, he saw in 1730 his son Peter III upon the Russian throne. But the Empress Catharine and her son Paul renounced the claim, and even gave up Holstein-Gottorp, in favour of the King of Denmark. There remained other Gottorp descendants, some of whom became kings of Sweden and imitated the Russian example, while another branch is represented by the Oldenburg ruling house.

The German argument, as summarized by Twiss, was—(1) that the duchies were independent States; (2) that the Salic law prevailed in both; and (3) that they were indivisible, and therefore that both passed from the Crown of Denmark. Holstein was obviously not independent until the fall of the Roman Empire in 1806. Schleswig was equally clearly at one time dependent on the Crown of Denmark: but in 1658, the king had ceded to himself, as Duke of Royal Schleswig, similar rights to those which he ceded to the Duke of Schleswig-Gottorp. The first position therefore seems tenable. But the second is shown by Twiss to be contradicted by many historical instances: Holstein was not one of the great *feuda vexilli*, but a dependent fief of Saxony. Recent family statutes had indeed entailed the several duchies. But on failure of the entail, they must revert independently of these instruments. The third position has already been dealt with. Twiss uses the illustration

of the position of Henry IV as Duke of Lancaster, when the duchy was saved from merger, to throw light on the dual position of the Danish King as at once Sovereign and Lord of Schleswig.[1] The conquest of 1721, alluded to above, resulted, Twiss holds, in a complete incorporation of Schleswig with Denmark. The ducal rights and the sovereign rights were united in the person of the King of Denmark.

In regard to Holstein, something remarkably similar happened in 1806. Holstein became independent. The Duke (who then happened to be King of Denmark) declared it combined with his monarchy as an unseparated part of it. Did this amount to a conquest by Denmark, or was it only a declaration of a temporary fact, such as George III might have made about Hanover? According to Twiss, it matters little. If there was a conquest, *cadit quæstio*, the succession is the same as the Danish. If not, still the succession is the same. For the entail was exhausted, and one is thrown back on anterior principles in dealing with the reversion. And these know nothing of Salic limitations.

Now Britain (in consideration of value received in the shape of Bremen and Verden) had guaranteed in 1715 to Denmark the ducal part of Schleswig, *contra quoscumque*, with all its might and all its power. And when in 1848 Prince Frederic of Augustenburg appeared in arms in Holstein, and was supported by Prussia, British mediation, backing the Danish blockade of Stettin, secured an armistice, and eventually saw an accommodation arrived at in 1852. On Frederick VII's demise in 1863, Prince Frederic's son again appeared in the field, and Prussia and Austria, assuming to act as self-constituted arbiters,

[1] In 1 Edw. IV, the duchy was assigned to the king, *as* king (though separate from his other property); but in 1 Hen. VII an ambiguous statute rendered it possible to argue that the duchy was now re-vested in the king *as a person*. Such a contention was analogous to that set up against the Danes.

somewhat after the fashion of Edward I in Scotland, occupied and eventually seized the duchies. The Danish forces distinguished themselves both on land, and (in the battle of Heligoland) at sea, when the allied squadron took asylum in British waters. France was ready to support Denmark if Britain had done so. It can scarcely be doubted that the events of 1863-4, and the failure of Britain to act up to her engagements were (after Waterloo) the turning-point of the century's politics. For the part played by this country (to the scandal of Ruskin) in that crisis, his admirers have to thank—Henry, Viscount Palmerston! (It should be added that the article in the *Encyclopædia Britannica* assumes much that is highly problematical.)

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### Armed Merchantmen.

Some considerable doubt may be felt regarding the new policy of arming passenger steamers. Presumably the object is to enable them to start a career as cruisers immediately on the outbreak of war. Their own protection in the course of their mercantile employment can scarcely be seriously urged as the object. East Indiamen were equipped to engage pirates in the old days—but surely it is not suggested that a mail steamer full of passengers is going to try conclusions with any armed cruiser? Anything of her own speed in a sea-way is certain to be much better armed and protected. And, allowing that she could meet on equal terms those useless types the *Amethysts* and *Advances*, there are not many of that class in foreign navies. Nor, again, are torpedo-gunboats likely to be used for preying on commerce. It is difficult to believe that, even if an armed steamer met a would-be captor of this description, she would actually fight an engagement which would certainly result in great loss of life, and considerable damage.

The late Admiral Colomb once read a paper at a Conference of the International Law Association in which he spoke of the influence of the torpedo upon maritime capture. It was pointed out by the present Lord Justice Phillimore and others that a secret blow with a torpedo can never be an admissible method in respect of a neutral contrabandist or blockade-runner. The ship must be duly summoned to stop, and only in case of subsequent evasion or resistance can forcible measures be justified. Since any vessel may turn out to be a neutral, it can never be safe to open fire on a suspected merchantman without verifying her character. Is the armed mail-ship, then, to open fire on the hostile cruiser? If so, she really becomes an uncommissioned cruiser herself, and is "asking for trouble."

## Cession and Nationality.

The Porte has experienced considerable difficulty during the course of the peace negotiations with Bulgaria and Greece, in settling questions of nationality regarding the population of the transferred regions. Such difficulties are of recent origin. In olden times it was the territory alone to which the conqueror looked. By virtue of his new territorial sovereignty he became entitled to the submission of every person actually within that territory, and that was enough for him. The tendency in quite recent years to lay additional stress on the personal tie between State and subject, and to assert limitations on the autonomy of the territorial sovereign when the subjects of other States are concerned, has brought about an entirely new situation. The conqueror now no longer thinks of soil but of souls. The cession is not a cession of territory only but a cession of subjects. The first glimmerings of the new state of affairs appeared when cessions were made dependent on plebiscites of the ceded territory. Then the status of the population began to be the subject of special provisions. As in the

case of the cession of Heligoland, an option to retain their former nationality was conceded to them. And now the position of the inhabitants is, perhaps invariably, made the subject of special regulations. On the occasion of the recognition of Servia as an independent kingdom, the nationality of the Ottoman inhabitants was the subject of very vague provisions, which gave rise to an acute controversy, dealt with in an able fashion by Prof. Peritch, of Belgrade, in "*A Case of Change of Nationality without Cession of Territory.*" In fact, the provisions of treaties cannot be too explicit on this head. "Inhabitants" is an ambiguous word, and cannot safely be employed to designate the transferred population. Transitory allegiance is transferred over many commorants who do not "inhabit" the district: not a few "inhabitants" owe permanent allegiance to other States altogether. It is said that Greece and Bulgaria are pressing the view that Ottoman natives of the ceded districts ought to be transferred, equally with residents; it is difficult to see why this should not be admitted, if once we begin to cede persons as separate items in the parcels of conveyance. If, as is alternatively urged, these non-resident natives receive an option to choose Ottoman or Balkan nationality, the result will be practically identical—for being of Balkan races they will naturally choose to become Greeks or Bulgars. Either way, Turkey loses many subjects actually inhabiting and settled in her restricted dominions. Formerly this would have been ridiculous. It is a tribute to the force of the modern revival of the personal tie of nationality that it no longer seems so.

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## Von Bar and Asser.

Two international publicists of the very first rank have been removed by death—one just before the Oxford Session of the Institute, the other on his way home from it. Privy Councillor C. L. von Bar, though not one of its founders,

was one of its very earliest members, having been elected in 1874. Born a subject of William IV, at Hanover in 1836, he became Professor at Rostock in 1866, and at Breslau two years later. In 1878 he occupied the chair at Gottingen, and at his death was probably the best-known international jurist of the world. Some writers are celebrated as Private, others as Public, International lawyers. Von Bar was equally great in both departments. Though his larger works dealt with Private law and Criminal law and Practice, his views on topics of Public International law were invariably received with the respect due to a master of the subject. We need only refer to his recent article in the *Revue de Droit International Public* (1910) on International Watercourses, and to his original and persuasive monograph on Contraband in the *Revue de Droit International* (Vol. 26), in which he advances in a brilliant fashion the arguments in favour of the abolition of Contraband. The Professor must have felt some gratification when the British Government formally made the same proposal in 1907 at the Hague Peace Conference. Von Bar showed how little the interruption of neutral commerce affected the issues of war—and how it could never decide in a permanent fashion the true issue between the two combatants, one of which had been in this way prevented from using its own resources of cash and credit. His writings are all marked by a breadth and insight which are rare, and perhaps growing rarer. *The Theory and Practice of International Private Law* has been translated into English by Gillespie. Von Bar was a frequent attendant at international gatherings. His slight figure, burdened with baggage, would be hurried by his indomitable spirit in all weathers across the Belts or the Channel: and when he spoke no one could have been listened to with more admiring esteem. We will add that universal sympathy will be felt with Mrs. von Bar, whose gracious kindliness has been experienced by many English friends.

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Privy Councillor T. M. C. Asser seemed much younger, though he was actually born in 1838 (29th April). He was born at and studied in Amsterdam, and practised there at the Bar, becoming Professor of Law in 1862. His ability having marked him out for State employment, he was made legal adviser to the Foreign Office in 1875; Edinburgh made him an LL.D. on the occasion of her great Tercentenary celebration of 1884: and in 1891 he was made a member of the Provincial Council of North Holland. Readers of this magazine will be familiar with his proposal to fuse the criteria of nationality and domicile by the adoption of a novel "private-law nationality" which is practically indistinguishable from our conception of domicile. As a compromise which would give Anglo-Argentine-Americans the kernel of substance, whilst according to Continental ideas the shell of nomenclature, this proposal would certainly find little serious opposition on this side of the channel. On the whole, Asser's most conspicuous work was done in the sphere of Private International law. He was best known in our country as one of the founders and editors of the *Revue de Droit International.* Asser was a personage of handsome and commanding presence, and of the kindliest nature. His interest in Peace was absorbing and genuine. Like von Bar, he was a Member of the Permanent Arbitral Tribunal at the Hague. But he was also a most indefatigable pacificist, though by no means an impracticable one, and his work for international peace was the ungrudging service of a great man. He was at the time of his death Hon. President of the Netherlands Branch of the International Law Association, of which association he had long been a Vice-President.

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## Den Beer Poortugael.

More than a passing reference ought also to be made to the labours in the cause of the Law of Nations of the late

Privy Councillor, General den Beer-Poortugael. A countryman of Asser, General den Beer Poortugael was born at Leyden on 1st February, 1832, and became in due course lieut.-general in the Dutch service. He was professor at the military staff college and subsequently Director: and naturally was attached to the Dutch mission which attended the Brussels Conference on the Laws of War in 1874. He subsequently filled various high offices, including that of Minister of War. His efforts at one Peace Congress after another, on behalf of the small nationalities, are well known. The right of an unorganised civil population to combine in self-defence against an invading enemy, is frowned upon by the military empires. Their cue is to treat every such combatant as a rebel, whether the area of operations has been reduced to military occupation or not. Switzerland, Holland, Norway, and Great Britain, which rely in a large measure upon the reserve which they possess in their civil population, desired to give that population a regular indefeasible authorisation to take the field in self-defence, so that they would be entitled to the privileges of prisoners of war. Their efforts were in a large measure successful: the only loophole left to an invader (and it is rather a large one) being to regard himself as formally "in occupation" of territories to some point within which his vedettes have paid a hurried visit. At the Hague Conference of 1899 Den Beer Poortugael's address on Disarmament is said to have been "most eloquent and brilliant": and he again represented the Netherlands at the Conference of 1907. He was elected to the Institute of International Law in 1874, becoming a full member in 1888. In the latter year was published his work on International Maritime Law, in which field he displayed a soundness of perception and a grasp of principle which are not only surprising in a soldier, but are not excelled by any of the recognised authorities on that special subject. Indeed, they are considerably more

conspicuous than in the case of some admired authorities. His dissent from the novel doctrine of continuous voyage, even when applied to obvious munitions of war alone, is recorded in the *Annuaires* of the Institute (vols. 13 and 14). He was one of the old school of jurists, holding firmly to clear and positive conceptions as constituting the very essence of law: and his loss, even at the advanced age which he had reached, will be severely felt.

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### Institute of International Law.

The session of the Institute, which took place under the presidency of Prof. T. E. Holland, in Oxford, last August, was almost entirely devoted to the discussion of the draft code of the laws of war at sea as between belligerents. It is understood that the new principle that warships cannot be commissioned except within the territory of the commissioning Power was approved. It will, however, be very difficult to treat as a pirate a vessel for which a belligerent State assumes full responsibility. And if the new rule means less than this, it must be of little avail.

TH. B.

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## VIII.—NOTES ON RECENT CASES (ENGLISH).

IT is rarely indeed that one has occasion to express doubt as to the soundness of any decision of Mr. Justice (now Lord Justice) Swinfen Eady, and when the occasion does arise, one does so with great misgiving. Therefore, one feels the more satisfaction when one has doubted to find in the result that the doubt was justified. In *Central London Railway Company* v. *City of London Tax Commissioners* (L. R. [1911], 1 Ch. 467), that very learned judge decided two points. The first was that, when land is freed from the land tax so are all future works erected on and under it. The second was that, when the tax on land fronting a

highway is redeemed, there is no presumption that the redemption extends over the highway *ad medium filum*. In commenting on these decisions, while agreeing respectfully with the first, we expressed strong doubt as to the second. (*Law Magazine*, Vol. XXXVI, p. 475.) On appeal, the Court of Appeal, by a majority (Cozens-Hardy, M.R., and Kennedy, L.J., Farwell, L.J., dissenting), reversed the second decision (L. R. [1911], 2 Ch. 467). And now that reversal had been unanimously sustained by the House of Lords (L. R. [1913], A. C. 364).

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The main argument of the appellants was that the land tax was to be assessed on the "annual value" of the land, and as the land under the highway had at the time of redemption no annual value, it could never have been assessed. In this connection it may be noted that the House of Lords has just decided that, for the purposes of the land taxes imposed by the Finance (1909-10) Act 1910 "the assessable site value of land" may be shown in the valuation as a minus quantity, in other words as less than nothing (*Inland Revenue Commissioners* v. *Herbert* (L. R. [1913], A. C. 326).

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Two tendencies have lately been displayed by some Courts. The one has been to hear cases privately, either *in camera* or in chambers. The other to keep from the public information as to what has actually happened in open Court. Both were usually followed in the interest, not of justice, but of one or both of the parties. And both were enforced by treating or threatening to treat any disclosure of the proceedings as a criminal contempt of Court. Courses better calculated to bring the administration of the law under suspicion or to prejudice the characters of innocent persons it is difficult to conceive. It is to be hoped that the decision of the highest tribunal in the land

in *Scott* v. *Scott* (L. R. [1913], A. C. 417), will, at any rate, check these practices. There it is laid down in the most emphatic language that cases can be heard privately, and the publication of proceedings in Court can be treated as criminal contempt, only when this is absolutely necessary to prevent the defeat of justice.

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An excellent example of a case where a hearing in private might be necessary in the interest of justice is supplied by *Amber Size and Chemical Co. Ltd.* v. *Menzel* (L. R. [1913], 2 Ch. 239). There the action was for an injunction to restrain an ex-servant from using or disclosing a secret process of manufacture, knowledge of which he had obtained in his former employment. Now if evidence of the nature of such secret process had to be given in open Court, or was reported in the press, the whole object of the action must be defeated. In this case it was not necessary to give any evidence of the nature of the secret process, since the judge (Astbury, J.) very sensibly held that once the Court was satisfied that a secret process existed, that the defendant had been informed of it in his employment, and that he had made an improper use of his information, an injunction should issue.

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Two very strange arguments were used in this case. The first was that an employee could be restrained from using information obtained in his employment only when it was reduced into writing: the other that he could not be restrained unless he got the information in express confidence. As a matter of fact, in ninety-nine cases out of a hundred where disclosing or publishing information has been restrained, the confidence has been implied from the relationship between the parties, and the question in each has been not whether the information has been reduced into writing, but whether it has been improperly used, though

the existence of writing renders that question much more definite, and therefore makes it much easier for the Court to restrain any breach of confidence.

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In *Attorney-General* v. *Horner* (No. 2) (L. R. [1913], 2 Ch. 140), argued in the Court of Appeal for eleven days, the Master of the Rolls points out that there was not any serious dispute as to the facts or many points of law to decide. No doubt the value of the subject-matter of the action contributed at least as much to the length of the discussion as the difficulties of the case. The facts were these. The appellant had in another case established his right under a charter of Charles II to hold a market in Spittle Square on Thursdays and Saturdays, and in doing so to let the market overflow into adjoining streets. He had also for many years past held markets on the other week-days which also overflowed, and he now claimed that the Court was bound to presume a legal origin to justify this overflow. The Court held that as his whole claim had always been based on his charter, he could not now base part of it on a presumption. And further, he had for many years past demanded the tolls from the sellers, and not, as legal custom prescribed, from the buyers. The Court held that no consideration of convenience could entitle him to do this. Another point decided was that ancient maps are not evidence of particular facts appearing on them.

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Is land situate in a foreign country not under English law realty within English law? That is the question raised in *In re Smith, Smith* v. *Smith* (L. R. [1913], 2 Ch. 216). Eve, J., there held that it was, even though the will dealing with it lumped it up with what in English law is pure personalty, so that a charge of debts on the foreign property does not exonerate the residuary personal estate from its primary liability. One would think that a highly technical

distinction of English law, obtaining in no other legal system, should hardly be applied to assets in a foreign country not under English law, especially when the result is to defeat the intention of the testator.

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A shocking example of the litigation which arises through the bad drafting of Acts of Parliament will be found in *Battersea Borough Council* v. *City of London Electric Supply Co., Ltd.* (L. R. [1913], 2 Ch. 248). The Act in question there gave the defendants power "to make a connection" between two systems of electric mains supplying different districts. They had made a connection, and now wanted to make another, but the local authorities objected. The Court held they were entitled to make a second connection on the ground that "make a connection" really meant "connect." But if that was meant, why was that not said?

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Though probably correctly decided on authority, *Hope* v. *Osborne* (L. R. [1913], 2 Ch. 349), is contrary both to analogy and common sense. It decides that commoners are not entitled to abate a nuisance which does not exclude them entirely from their right of common. On the ground of analogy, is a householder not entitled to pull down an obstruction to his light unless it deprives his house entirely of light? On the ground of common sense, is a commoner not entitled to common over the whole land, and when a nuisance excludes him from part of it, is he not totally deprived of his right so far as that part is concerned.

J. A S.

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When a public official is compelled by statute to detain under certain circumstances a person whom another public official believes to be a lunatic, it is a public obligation to hold him harmless for his compulsory act. The staying

of the action in *Shackleton* v. *Swift* (L. R. [1913], 2 K. B. 304), was quite within the terms of the Lunacy Act 1890, for though by sect. 20 the first period of detention in a workhouse of the suspected lunatic is not to exceed three days, there may be an extension to fourteen days; and whether or not the certificate of the medical officer was technically regular in this case requiring the defendant, the master of the workhouse, to keep the patient for further observation for a few days beyond the three, sect. 330 of the Act affords relief from civil or criminal proceedings, on any ground, against a person who in pursuance of the statute has acted in good faith and with reasonable care. This provision will probably serve to stay any other actions arising out of the same incident that may be contemplated.

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Two cases recently reported discuss the jurisdiction of English Courts over a British subject who has been adjudged, in a country beyond the shores of England but within the Empire, to have incurred liabilities. Of course a chief difficulty in such an investigation is when a defendant, before the commencement of proceedings, has quitted the country where the claim was decided and has left no property there. This was the condition in both cases. In both cases also service out of the jurisdiction was allowed. In *Phillips* v. *Batho* (L. R. [1913], 3 K. B. 25), where both parties professed Christianity, damages against the defendant as a co-respondent had been awarded by the High Court of Bengal. He had removed from India, leaving no property behind him, before the petition was presented, and had come to England where he was served with the summons. The decision of Scrutton, J., is noticeable first of all for what it excludes. It is not enough that petitioner and co-respondent are both subjects of the realm. Nor is it enough that the Indian Divorce Act allows service out of the

jurisdiction. The source of the judgment is in philosophical not technical grounds. As questions concerning marriages are assigned to the Indian Courts, a Christian domiciled in India could not obtain from the English Courts a remedy for marital wrongs. And if damages decreed in such a case by an Indian Court could not be enforced in England, then a co-respondent might defy both jurisdictions and deride the judgment against him. But then comes the point which saves the situation. Marriage is a matter of status. Judgments on questions of status are *in rem.* Consequent on such judgments is the power to give damages for infringement; and this is recognised in England and India both. On these grounds, Sutton, J., is of opinion that the English Courts will enforce orders of the Indian Courts for damages in matters of status within the Indian jurisdiction; and so to the five cases set out in *Emanuel* v. *Symon* (L. R. [1908], 1 K. B. 302), in which the English Courts will enforce a judgment from abroad, must now, presumably, be added a sixth.

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In the other case of *Gavin, Gibson & Co.* v. *Gibson* (L. R. [1913], 3 K. B. 379), the question was of narrower compass, for the claim was on a judgment of the Court of Victoria for debt incurred in the colony and sued on long after the defendant had left. He did not appear to the action. He was born in Victoria of immigrant parents, and he had formerly lived in the colony for twenty-six years. From these facts of birth and residence, Atkin, J., was "unable to infer" that the defendant's domicil either of origin or choice was Victoria. This, no doubt, was right. On the hypothetical point whether, if the domicil had been Victoria, effect would have been given in England to a judgment of the Colonial Court, the learned judge was "content to record a doubt." But he decisively ruled that the fact of the defendant having given instructions, which were not

fulfilled, for a solicitor to appear for him in the colonial proceedings, did not estop him from denying submission to the jurisdiction. The authorities conclusively show that in a personal action commenced and determined in the absence of a defendant who has not submitted to the jurisdiction and has no property in the district covered by the jurisdiction, the judgment is a nullity. So that, these points being eliminated, the sole remaining question was whether the birth of the defendant within the colony made him a subject of the colony. Murray's *Dictionary* has not yet reached the word "subject," nor has Lord Halsbury's *Encyclopædia*. But a fair definition of the word is, that it signifies one who owes allegiance to a sovereign and is governed by his laws, and that such a person belongs to the nationality of which the sovereign is the head. Obedience to the laws of the colony in which he is resident he of course owes. But obedience is subordinate to allegiance. He could not detract a portion of the allegiance which he owes to the entire nationality and allot it to a mere territorial fraction of the Empire. On these grounds the judgment could not reach the defendant.

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So firmly entrenched is *Cavalier* v. *Pope* (L. R. [1906], A. C. 429), that nothing but fresh legislation can subvert it. But the Housing and Town Planning Act was passed three years later, and in *Ryall* v. *Kidwell & Son* (L. R. [1913], 3 K. B. 123), an attempt by means of this Act was made to overpass the ruling case. The circumstances in both contentions were almost identical: a relative of the tenant of a house was injured through the dangerous state of the structure. But there is this difference between the two. In *Cavalier* v. *Pope* the house was taken under a promise by the landlord that it should be put into habitable repair and no measures were taken to keep the promise. In *Ryall* v. *Kidwell & Son* there was no such undertaking,

but the house was one falling within the terms of sections 14 and 15 of the Housing and Town Planning Act, which enact that a condition shall be implied in a contract of letting that the house shall at the start be reasonably fit for habitation and shall be so maintained during the term. On this it was claimed for the plaintiff that when a statute imposes a duty for the benefit of a class, then, in the absence of anything to the contrary, such as a special penalty, any member of this class may sue who is injured through breach of the duty on the part of the landlord. Strictly, the Act adds merely a clause to the contract between the landlord and the tenant. There is nothing in it to attach an indirect liability to the landlord. For a breach of the condition which the Act imposes there would be a right of action by the tenant, but the right is not extended to anyone not a party to the contract. Probably the decision that the claim was negatived by *Cavalier* v. *Pope* will hold good, but the full effect of the Act was not completely exhausted by the judgment. It is interesting to remember what the opinions of the Bench have been in the past on the main question. In *Nelson* v. *Liverpool Brewery Co.* ([1877], 2 C. P. D., page 311), the joint judgment of Lopes, L.J., and Denman, L.J., runs: "We thiuk there are only two ways in which landlords or owners can be made liable in case of injury to a stranger by the defective repair of premises let to a tenant; first, in the case of a contract by the landlord to do repairs where the tenant can sue him for not repairing; second, in the case of a misfeasance by the landlord, as for instance, where he lets premises in a ruinous condition. In either of these cases we think an action would lie agaiust the owner." And when *Cavalier* v. *Pope* was before the Court of Appeal, Mathew, L.J., was of opinion that the plaintiff, the tenant's wife who was injured, was "entitled to a remedy at law for injury she sustained."

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Interesting as the full facts are in *Jowett & Son* v. *Union Cold Storage Co.* (L. R. [1913], 3 K. B. 1), their number and complexity preclude their being condensed into the space available for a note. But the points of law can be dissociated from most of them. When a cargo of Australian meat, purchased by a company in which the plaintiffs had an interest arrived in London, it was lodged in the cold storage of the defendants with the consent of a bank who were the pledgees of the bills of lading, and held these documents as direct security for discounting a bill of exchange for the outlay on the venture, drawn by the plaintiffs to the bank's order and accepted by the purchasing company. On the failure of the purchasers to honour their acceptance, the plaintiffs had to meet the bill and therefore become entitled to the documents of title. It is a custom of the cold storage trade not to accept the care of goods unless on the condition of a general lien for all sums due by the storer, and this condition as regards themselves the defendants expressly announced in their printed forms. It happened that the purchasing company, the storers and original owners of the shipment in question, were indebted to the defendants for other storage charges in respect of similar transactions between all the same parties; and the defendants therefore claimed their general lien. The plaintiffs admitted a particular lien on the one shipment, but eventually paid the full claim under protest; and they now sought to recover for money paid under duress. But they failed on the ground that as sureties they had only the rights of the bank, who had given authority to the purchasing company to secure the preservation of the meat on the usual terms, and as these terms "involved a general lien, the lien was good against the bank." There were two other points that may be noted. The defendants contended that as a particular lien had been admitted, it applied to carcases from each ship; and this contention, Scrutton, J., thinks is correct in

law; and indeed, analogous cases will support this view. The other point is that Scrutton, J., was "by no means satisfied" that the value of bills of lading as documents of title does not expire when the freight is paid and the goods landed from the ship at the agreed port. But this point it was not necessary to decide.

T. J. B.

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## SCOTCH CASES.

Where a discharge is granted of a debt all question of liability is then at an end, unless the discharge can be reduced on averments of fraud, essential error, or something similar. With regard to a docquet on an account, it was decided in *Laing* v. *Laing* (24 Dunlop 162) that the effect of it was to reverse the onus and not to exclude inquiry altogether; that is to say, the party averring the docquetted account to be wrong must be put to explicit proof on that point. Now, the case of *Struthers* v. *Smith* ([1913], 2 S. L. T. 157) does not deal with a discharge or docquetted account, but merely with the position in law of accounts rendered half-yearly, and the finding of the Court was, (1) that there was a presumption that all disbursements made by the party rendering the accounts, in this case a property agent, over the period covered by each statement, were included in the statement; and (2) that the onus was on the party claiming payment of past disbursements to show that the statements rendered in the past were incorrect.

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The question decided in *North British Railway Co.* v. *Wingate* ([1913], 50 S. L. R. 857) is one of very wide general interest, and deserves to be read with special care by those in charge of the investment departments of banks, insurance companies, and other financial concerns. The North British Railway Act of 1888 declared that, as regards any

preference share or stock which should be entitled to a preferential dividend out of the profits of each half-year, no part of any deficiency in interest or dividend should, in the event of it turning out that in any half-year there were not profits available for the payment of the full amount of preferential dividend or interest, be made good out of the profits of any subsequent half-year. In pursuance of this Statute the accounts of the Company were made up half-yearly, and the preference shareholders were paid out of each half-year's profits. In 1911 the Railway Companies Accounts and Returns Act was passed, sect. 4 of which provides:—"A railway company shall not be under any obligation to prepare or to submit to their shareholders or auditors statements of accounts or balance sheets or to hold ordinary general meetings more than once a year." The case referred to was brought for the purpose of determining whether the terms of the 1888 Act, which contemplated a half-yearly division of profits, were overridden and displaced by this Statute in favour of a yearly computation. The Court held that dividends upon preferred ordinary stock must be paid only out of the profits of each separate half-year, and no part of a deficiency in one year should be made good out of the profits of the next or any subsequent half-year. That is to say, the general accounting Statute of 1911 does not affect the special Acts of railway companies dealing with their capital. The opinion of the Lord President, Lord Dunedin, is one of great interest, and makes very plain the difference between a half-yearly and a yearly accounting, and the reasons why a change from the former to the latter should not be made.

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The practical importance of the point is our excuse for referring here to a Sheriff (County) Court decision. The important provision of the Workmen's Compensation Act which declares that "weekly payments or a sum paid by

way of redemption thereof shall not be capable of being assigned, charged or attached," has been the subject of a decision of great practical interest in the Sheriff Court at Greenock (*Woods* v. *The Royal Bank of Scotland* [1913], 1 S. L. T. 499). A sum of £235, which admittedly represented the balance of a sum of £325, which had been paid by way of redemption of compensation, was arrested in the hands of the Royal Bank of Scotland, with whom it lay on deposit receipt. The arrester maintained that the protection of the statute only applied to the compensation money so long as it was in the hands of the Clerk of Court, and that whenever it was paid over it became part of the common debtor's moveable estate, and liable to all legal diligence. The Sheriff took the view that compensation money was designed by the statute to be of an alimentary nature for the subsistence of the workman, and that so long as money belonging to a workman can be identified as having come to him by way of compensation, it is protected from arrestment.

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The case of *Wood* v. *Clydesdale Bank Limited* ([1913], 2 S. L. T. 82), which arose out of the theft of an endorsed deposit receipt is worth notice. Wood sent a registered packet to his brother containing a deposit receipt for £100 with the Clydesdale Bank, endorsed by him, and a letter addressed to the Bank asking them to pay £60 to his brother. At the same time he posted a letter to the Bank asking them to pay £60 out of the £100 deposited with them to his brother. The registered packet was stolen, and the deposit receipt and the letter which it contained were presented at the Bank by someone who represented himself as Wood's brother, and who, at the request of the Bank, endorsed the deposit receipt by forging the name of Wood's brother. The Bank thereupon paid him the £60, and handed him a deposit receipt

for the balance in the name of Wood. Wood raised an action against the Bank for £100, being the amount in the deposit receipt. Lord Hunter gave decree for the sum sued for. He said that it was a case where one of two innocent parties must suffer for the fraud of a third party. Here the loss must fall on the Bank. A deposit receipt was not a negotiable instrument. The Bank had come under an obligation to pay to the person named thereon, or according to his instructions. The fact that a person was in possession of the endorsed deposit receipt did not necessarily mean that he had a right to receive payment of its contents. If the Bank chose to make a payment to him it must take the risk of having to pay over again, not only in a case where the signature was forged, but also in a case where it was proved that the holder of the deposit receipt was not entitled to payment, unless it could be shown that the depositor had contributed to the mistake by his own negligence. Here the Bank could only maintain its defence by showing that the payee was really Wood's brother.

D. M.

## IRISH CASES.

When an Irish tenant-farmer dies intestate, possessed of a moderately small estate, it is the exception rather than the rule that any surviving relative should take out administration. The ordinary custom is that the widow and children remain in occupation of the farm, working it as before. Each of them on the intestate's death becomes entitled to a specific undivided interest in the tenancy, in respect of his or her share under the Statute of Distributions. As time goes on, and as some of the children leave the farm and some receive a "portion" or "fortune" out of the assets, questions as to the transmission or devolution of the various shares among the

several members of the family often become complicated, and lead to many an equity suit in the County Court. In particular, where some of the children are minors at the time of the intestate's death, a mother or other adult member of the family taking possession of the land is held, so far as the infants' shares are concerned, to be in possession as a "bailiff" for such infants. In the past, some Courts have seemed inclined to hold that virtually no lapse of time, and hardly any other circumstance, could put an end to this bailiffship, so as to cause the Statute of Limitations to bar a child who was an infant at the intestate's death. It is now admitted that this view was exaggerated. In *MacMahon* v. *Hastings* ([1913], 1 Ir. R. 395), will be found a useful summary of the law. In order that a person entering upon an infant's estate should be held a bailiff for the infant, he must enter with a knowledge of the infant's rights. But if he has that knowledge, then he continues a bailiff even although the infant has come of age; some other circumstance, beyond the mere attainment of majority, is necessary to dissolve the relationship. One such circumstance will be a demand of possession: if that is refused, the possession of the former bailiff becomes "adverse" from the time of the refusal. Only, if the demand and refusal are within six years before an action brought by the infant, the latter's rights are saved by sect. 3 of the Real Property Limitation Act 1874.

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Of cases upon the construction of wills there is no end: of reconciling some of those cases with each other there is hardly even a beginning. Two recent decisions illustrate the divergent views, which different judicial minds may take of very similar words, in deciding whether a person has a beneficial interest or is a trustee. In *Hickey* v. *Hickey* ([1913], 1 Ir. R. 390), a husband bequeathed to his wife his entire worldly effects "to be managed as best she can for the benefit of our children"; and it was held, that this

gave no beneficial interest to the wife. In *Berryman* v. *Berryman* ([1913], 1 Ir. R. 21), a husband gave to his wife all his property (enumerating it) "to be disposed of as she may think best for the good of our children"; and it was held, that this gave the whole beneficial interest to the wife, unaffected by any binding trust. The former is a decision of the Court of Appeal, the latter of a judge of first instance; and, therefore, it looks as if *Berryman* v. *Berryman* would not have a very useful career as an authority. If one could speculate as to what was really in the minds of the two illiterate testators, while two semi-literate but unprofessional friends were writing out their wills, one would probably think that neither testator wished his wife to take nothing and the children to take all; but this guessing is dangerous, and *litera scripta manet.* The moral is the old one: that if you wish a recipient of bounty under your will to take an out-and-out beneficial interest, you ought to say so with decision.

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In the August number of the *Law Magazine*, these notes referred to a case upon the legality of an agreement between husband and wife (who were living apart when the agreement was made), providing for an immediate reconciliation, but also making provision for the wife in the case of such reconciliation not proving permanent. Such an agreement, although in a sense it contemplates a future separation, was held valid and not contrary to public policy. That decision has now been affirmed by the Court of Appeal: *Purser* v. *Purser* ([1913], 1 Ir. R. 428). The judgment of Palles, C.B., is valuable as reviewing the development of the law as to separation-agreements from early times.

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Where a person libelled resides in Ireland, and the author of the libel in England, the attempt to keep the trial of the libel action in Ireland meets with some difficulties. The Irish R. S. C., Ord. XI, r. 1 (*h*), provide that leave may be

given to issue and serve a concurrent writ out of the jurisdiction against a person who is a necessary or proper party to an action properly brought against a defendant within the jurisdiction. It seemed therefore that if there had been a publication of the libel in Ireland (say, the sale of a newspaper by a news-agent), an action might be begun in Ireland against the news-agent, that the Author might be joined as a co-defendant to this action, and that then leave might be obtained to serve a concurrent writ out of the jurisdiction upon the Author. The risk is that the Court may hold that the action was not *bonâ fide* brought against the nominal defendant within the jurisdiction; and this was virtually the ground for setting aside the proceedings in *Ross* v. *Eason & Sons Ltd.* ([1911], 2 Ir. R. 459). In a recent case, however, *Cooney* v. *Wilson & Henderson* ([1913], 2 Ir. R. 402), such an attempt, under a stronger state of facts, was successful, and the order giving leave to serve the concurrent writ was upheld. Here the author of the alleged libels had sent over to Ireland placards containing them, and had employed a bill-poster to post and circulate these near the plaintiff's residence. The bill-poster was evidently in a very different position from that of the ordinary news-agent: the latter would be entitled to a verdict on showing that he did not know the newspaper which he sold contained a libel, that he had no ground for supposing it was likely to contain one, and that such ignorance was not due to his negligence. The bill-poster, a special agent for the publication of the alleged libel, could show none of these things—the Author suggested no defence but justification: and the fact that the bill-poster was said to be a pauper did not seem to the Court a ground for thinking that he was not *bonâ fide* made a defendant. Upon this view, the only question upon the construction of the rule was: Would the action lie against both defendants if both were within the jurisdiction?

J. S. B.

# Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

*The Lawyer in Literature.* By JOHN MARSHALL GEST. Boston: The Boston Book Company. 1913.

It is curious to notice the idea that the average dramatist has of the lawyer, which is intensified when depicted by the actor. We are all familiar with the judge who manages everybody's affairs with indifferent success, who generally has a pretty ward whom he bestows on the impecunious young barrister in the last act. Again, a familiar feature is the learned King's Counsel who displays lamentable manners by having a cross-examining scene with the villainess at a dinner party. Further, stage law has its peculiarities. A mortgage can be foreclosed in five minutes by the nearest villain, and the sorrowing heroine and her white-headed father are flung into the night to slow music. The hero is always arrested for murder, and handcuffed without warrant or information, only to be released upon the uncorroborated statement of the comic man, who directs the police to transfer the handcuffs to the nearest villain, which they do without demur. In the present interesting book Mr Gest gives us the position filled by lawyers in literature. Dickens, himself brought up in a lawyer's office, gave to the world the immortal trial scene of *Bardell v. Pickwick.* In many of his novels Dickens depicts in caricature the lawyers of his day. The second novelist dealt with is Sir Walter Scott, and here we have a most illuminating criticism of that celebrated man. Honoré de Balzac comes next, and to the reader is presented the marked contrast between Balzac's mental attitude towards morals and women, and his conservative treatment of Law and Politics. Further, the learned Author deals with the writings of Sir Edward Coke in a way that will be much appreciated by English lawyers. A judge of the Orphan's Court, Philadelphia, the learned Author shows himself to be a man of wide culture, with a pronounced sense of humour, and we can recommend with utmost confidence the perusal of these seven lectures as interesting to lawyer and laymen alike.

*The Eyre of Kent, 6 & 7 Edward II, A. D. 1313-1314.* Vol. III. Edited for the Selden Society by WILLIAM CRADDOCK BOLLAND. London: Bernard Quaritch. 1913.

This volume completes the *Year Books* of the Eyre of Kent. It contains the remaining titles of *Mortdancestor*, *Non-claim*, *Novel Disseisin*, *Nuper Obiit*, *Quare non admisit*, *Quod permittat*, *Quo Warranto*, *Replevin*, *Scire Facias*, *Variance*, and a collection of Notes on various matters. The Introduction by Mr. Bolland is mainly concerned with ambiguous points in cases here reported. They are consequently of a very technical nature. Of more general interest is the discussion upon the remuneration of the Justices and their staff of clerks. From the *Liberate* Rolls, for the most part unedited and unpublished, Mr. Bolland has ascertained the amounts payable to the Justices sitting during the Eyre of Kent, and from the Rolls of Juries and Assizes of this Eyre those allotted to the clerks. The latter apparently did not receive anything in the nature of a fixed salary, and appear to have been paid chiefly by fees. These fees were paid out of the damages awarded to the successful parties. There seems to have been no sort of proportion between the amount of the damages and the portion allotted to the clerks. Nor is there anything to show how the latter was apportioned between the clerks. Of the total sum of £870 given in damages in 180 cases, £124, or almost exactly one-seventh, goes to the clerks. In later times the clerks in the Court of Common Pleas had established the right to one-tenth of all damages recovered, and those of the Court of King's Bench and the Exchequer to one twentieth. This practice of the clerks was apparently regarded as a grievance by the public, but it was also followed by the Justices, who, when their own salaries were in arrear, as they usually were, did not hesitate to raid the damages due to successful plaintiffs. From the case of *The King* v. *The Abbot of Reading* we find the curious fact that a hare was valued at less than half the price of a rabbit. A cony is here valued at fourpence, whilst a hare is only assessed at three half-pence. At this period a capon was worth fourpence, and a fowl of the best quality twopence. Mr. Bolland explains this inversion of prices by suggesting that it was due to the recent introduction of the rabbit into England, and its consequent scarcity. The prejudice against hares, however, as an article of food has survived to modern times. We congratulate Mr. Bolland upon the completion of a laborious work finely executed.

*Lectures on Legal History and Miscellaneous Legal Essays.* By JAMES BARR AMES, with a Memoir. London: Humphrey Millford, Oxford University Press. 1913.

This book, which contains all the important writings of the late Professor Ames with the exception of two articles on the Negotiable Instruments Act, published elsewhere, should make the name of Ames a household word with law students in this country. Had he not been a great teacher, Ames would have been a great writer. His life-work lay in the class-room and in preparation for the class-room. His real work was the formation of the minds of those committing themselves to his influence. His rare scholarship and research were the means he employed in this high and serious task. He realised what a social force may be in sound legal instruction. And he is justified by his works. Well might he have retorted to those who would have turned his great powers to productive work "So that I train your lawyers and judges, let who will write your books." It was Ames, even more than Langdell, who established the "Langdell method" of studying and teaching law. A great legal historian, Ames sought to teach the law chiefly as a philosophical system. He used a case or a series of cases chiefly to form the basis of a Socratic discussion which should draw out the principle involved. Not that he neglected the historical method, as the *Lectures on Legal History* abundantly show. In the essay entitled *The Vocation of a Law Professor*, Ames gives a hint of the force which inspired his own work. It was the belief that, through the students who sat under him, he might leave his impress for good upon the legal system of his country. His ideal was to make the law school a seat of legal influence. His social conscience, his lofty conception of personal obligation, his legal ideals, have become the living creed of hundreds of strong men who have gone out from his instruction to become members and leaders of the Bar, judges and teachers of law in all parts of the land. And although his direct influence upon legislation was comparatively small, through his disciples he had a predominating influence in the work of the Commission on Uniformity of Legislation, which is destined to be the foundation of the commercial law of the United States. The present volume only makes the regret keener that Ames did not live after his retirement from Harvard to produce the works on legal history which he had projected. We know of no work which would be more fruitful of results in the hands of the young law student than these *Lectures on Legal*

*History*. Ames believed that a real and fundamental knowledge of present law could not be gained without a knowledge of the past. These lectures demonstrate the value of applied history in present-day affairs. Other lawyers have made the *Year Books* of the fourteenth century useful for the solution of some particular case: Ames made them the source of the most practical knowledge of current legal principles.

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*Federal Incorporation*. By R. C. HEISLER. Boston: The Boston Book Company. 1913.

This book forms the third volume of the publications of The School of Law of the University of Pennsylvania. The publication of each volume of this series requires the sanction of the Law Faculty, and the Authors must be connected with the school as members of the teaching force, fellows, or graduate students. The Author of this treatise, a graduate of the Law School and a member of the Philadelphia Bar, held the position of Gowen Memorial Fellow in the Law School for two years, during which he studied the constitutional questions which he here analyses and discusses. These questions are for the most part those arising under the power over inter-state commerce vested in Congress by the Constitution. It was not till 1887, when the Inter-state Commerce Act was passed, that Congress began to enact affirmative measures in the exercise of this power. Since this date the Sherman Anti-Trust Act and numerous other statutes have followed. "The decisions of the Supreme Court," writes Mr. Heisler, "clearly demonstrate that the limit of Congressional action has been by no means reached. The precise extent of the federal power has yet to be determined. The increasing power of industrial corporations renders more efficient control imperative." One method suggested is that Congress should itself incorporate companies to engage in inter-state commerce. A Bill with this object was introduced in the House of Representatives in 1910. It is the purpose of this treatise to examine the constitutional questions which would be involved as a result of such legislation.

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*International Arbitration amongst the Greeks*. By M. N. TOD. Oxford: The Clarendon Press. 1913.

Now that the Temple of Peace is a substantial and stately edifice, the subject of International arbitration may possibly attain an increased influence in the policy of civilised States. Historical

precedents would naturally form a prominent feature in the abstract principle of a reference of disputes to an independent tribunal. And if history can be interpreted by the evidence of material remains in ancient Greece, as supplemental to the records of literature, then this volume will assume an appropriate value. For it supplies many instances of important inscriptions on slabs of marble or stone, and on fragments of wall which excavations have brought under inspection, and these instances relate to the nature of differences submitted to arbitration in distant ages, the tribunals appointed, the procedure adopted, and the evidence submitted. The learning which the book displays commands the greatest respect.

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**Third Edition.** *Trade Union Law.* By H. COHEN. London: Stevens & Haynes. 1913.

Trade disputes pursued as they are just now, with bitter antagonism, are not only of disastrous effect on commercial prosperity and the progress of manufacture, but are also the causes of lamentable deprivation and distress So that a statement of the law on the subject, brought down to within the last four months, must be of wide interest. The book traces the growth of restraint on trade from Plantagenet times, and follows it in detail through the Trade Union Act of 1871 to that of the present year, and supplies the notes and rules established under the Acts. In addition, there are chapters on the Criminal law involved and on the limits on the expulsion of its members which the Unions may exercise.

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**Fourth Edition.** *Jurisprudence.* By J. W. SALMOND. London: Stevens & Haynes 1913.

The third edition of this work was reviewed by us in 1910, and there are two facts that should be noticed concerning the fourth edition, (*a*) It is substantially a reprint of the third edition: (*b*) The learned Author is still Solicitor General for New Zealand. These facts demonstrate that the reading public appreciate Mr Salmond's work as a writer, and also that ministries may change in New Zealand, but the Solicitor-General remains, a great testimony to the popularity of that official with his fellow-citizens in that remote part of our Oversea Dominions. We see no reason for dissenting from the good opinion held by the reading public. We like very much the contents of Appendix V, which gives not only a list of authorities, but also short explanatory notes concerning the writers themselves.

With regard to Grotius, we would suggest that his *Opinions* and *Introduction to Dutch Jurisprudence* are better known than his *De Jure belli ac pacis*, so that it is hardly accurate to say that "Grotius confines his attention for the most part to International law." Further, if Mr. Salmond would consult the Biographical Sketch appearing at the commencement of de Bruyn's translation of the *Opinions*, he would find that Grotius was also a Poet and Theologian; the latter fact being the cause of his banishment from Holland and the bitter persecution that he suffered.

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**Fourth Edition.** *The Law relating to Cheques.* By E. R. WATSON, LL.B. London: Butterworth & Co. 1913.

*The Law of Bills of Exchange, Cheques, and Promissory Notes.* By B. JACOBS, LL.B. London: Sweet & Maxwell. 1913.

Mr. Watson's position as co-Editor of *Byles on Bills*, fully entitles him to pose as an expert on the subject of Cheques. The present edition has been thoroughly revised and enlarged in a workmanlike manner. Negotiable instruments form the subject-matter of considerable legal decision, and cheques form no exception. Some of the decisions appear in Mr. Watson's estimation to be conflicting, and he expresses his personal opinion in no uncertain fashion. The final chapter on Limitation of Actions, which appeared in former editions, has been cut out, and much of the matter incorporated into the text elsewhere. Other subjects have been eliminated, the reasons for which are given by the Author, and appear to be adequate. All of which indicates that the present edition fully comes up to the high standard set by former ones.

Mr. Jacobs' volume would appear to be more in the nature of a text-book for students, and in his position of lecturer on English Law to the University College of South Wales and Monmouthshire, he would have acquired a knowledge of their requirements. Dealing with general principles and writing in broad outline, he presents a view of the subject comprehensible and lucid. The text is divided into three Parts. Part I has as its subject, "Negotiable instruments generally"; Part II, "Bills of Exchange, Cheques, and Promissory Notes"; and Part III, "Bills of Lading, I.O.U.'s, a Digest of Cases, and the text of the two Acts of 1882 and 1906." There is one portion of the book to which we would call especial attention, and that is the Digest of Cases. The reader is given a brief synopsis of the leading cases, which will help to minimise the need of a law library of Reports.

**Fourth Edition.** *Wertheimer's Law relating to Clubs.* By A. W. CHASTER. London: Stevens & Haynes. 1913.

Since the publication of the first edition, clubs have vastly enlarged their sphere. Then the term was confined generally to social institutions which were either proprietary or members' clubs Leaving out the political and gaming clubs of the 18th century, the modern social club was initiated by the United Service Club (familiarly known as The Senior) immediately after the battle of Waterloo. But since that day many other institutions quite different in character, largely connected with sport, such as golf clubs and cycling clubs, have been founded; and less in number but very powerful in degree, political clubs. And affecting most of them many Acts relating to licensing, finance, and various other burdens have been passed; and under these Acts numerous decisions have been given. So that the subject is now an extensive and complicated one; and this book elucidates most of the points which it is necessary for a club-committee-man to know, and which it is advisable for all club members to be acquainted with.

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**Eighth Edition.** *Law and Practice in Divorce and Matrimonial Causes.* By J. H. WATTS. London · Sweet & Maxwell. 1913.

*Browne and Watts on Divorce* needs no comments to recommend it to the legal profession as a sound and useful work on the subject. The present edition is by Mr. Watts alone, but he has obtained the assistance of Mr. Durley Grazebrook, Junr., a name familiar in the Probate and Divorce Division. As before, the text is divided into two parts; in Part I we find the law on the subject, whereas Part II is devoted to Practice. Mr. Watts has thoroughly overhauled the text, re-written it wherever necessary, and has brought his matter quite up to date. In the List of Cases the names of co-respondents have been added, a novelty which will enable the reader to see at a glance whether the Petition was brought by the husband or by the wife. The extracts given from Professor Dicey's *Conflict of Laws* are very useful as a guide to questions of Domicil, but we think that more discussion might have been devoted to the question of the recognition of Foreign Divorces by our Divorce Court, where it often crops up. Moreover, the heading "Foreign Divorce," in the Index, hardly seems adequate. Subject to these minor criticisms, the treatise seems to be based upon excellent lines and shows signs of careful treatment of the subject.

*A Supplement to the Law Relating to Trade Unions.* By J. H. GREENWOOD, B.Sc. London: Stevens & Sons. 1913.—In the year 1911 Mr. Greenwood issued a treatise on "The Law Relating to Trade Unions." Since that date the law affecting that subject has been materially developed by reason of decisions given in the House of Lords, the English Court of Appeal, and the Scottish Court of Session. Further, the Trade Union Act 1913 (2 & 3 Geo. V, c. 30) has been passed. The present Supplement is intended to be an analysis of the cases decided, and to show how the law has been affected by reason of the passing of the last-mentioned Statute. It will therefore be seen that the parent volume, together with the Supplement, brings the law on the subject of Trade Unions absolutely up to date. With regard to our criticisms on the parent treatise we can only repeat what was said on page 378, Volume XXXVI, of this Review, and to add that they apply with equal force to the Supplement. Mr. Greenwood's book was primarily intended for those readers who possess little if any legal training, and who have not access to law reports When judged by that standard, we are of opinion that the Supplement fulfils every necessary condition.

*Laws against Nonconformity.* By T. BENNETT, LL.D. Grimsby: Roberts Jackson. 1913.—In this little book the Author has sketched the history of laws which affect Nonconformity, using the word in its widest sense, as embracing every branch of religion other than the "Established" Church. It shows in vivid colours the growth of toleration, and the need of a still further extension of that virtue. To-day there is only a small amount of law which makes an invidious distinction. Writing from memory, the three great offices not open to Nonconformists are those of (*a*) The Crown; (*b*) Lord Chancellor, as keeper of the King's conscience: (*c*) Lord Lieutenant of Ireland. There is much which can be said *pro* and *con*, but that "much" would be out of place in a review. We remember that a great discussion arose in the lifetime of Lord Russell of Killowen, who, as a Roman Catholic, was debarred from occupying the post of Lord Chancellor. Mr. Bennett has given us a most useful little work, based upon a subject which he, apparently, takes very much to heart.

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*The Practice in Enfranchisements under the Copyhold Act 1894.* By G. W. LLOYD, LL.B. London: Stevens & Sons. 1913.—We were always under the impression that the only person who could make the subject of copyholds at all interesting was Mr. Archibald

Brown, who wrote a book on the subject. We must revise our opinion, as Mr. Lloyd certainly has given a touch of romance to a dry subject in his Chapter on the "History and Nature of Copyholds." The manor courts are among the few remaining traces of the feudal times, and we have their history and incidents clearly stated by the learned Author. The book contains twelve chapters, and each branch of this abstruse subject is adequately stated and elaborated. Mr. Lloyd occupies the position of Head of the Tithe and Copyhold Branch of the Board of Agriculture and Fisheries, so that in preparing this interesting little work he brings to bear a practical knowledge which illuminates the theoretical knowledge gained by his legal training for the Bar.

*Receivers and Liquidators.* By H. C. EMERY. London: Effingham Wilson 1913. To form a thoroughly practical treatise on the appointment and duties of Liquidators in winding up, whether voluntary or under supervision, and of Receivers, is a very useful project; and the Author has well attained his purpose of making the work a *vade mecum* in all respect for the guidance of such officials.

*The Law Relating to Prospectuses* By F. E FARRER. London: Effingham Wilson. 1913 Promoters, directors and secretaries of public companies are the class for which this work is especially prepared, and the Author has with great care essayed the difficult task of expressing in simple phraseology the somewhat complicated and frequently perilous obligations which two at any rate of the class assume. The Joint Stock Companies Act of 1908 is in all essential points set out, and the comments on these sections display b[illegible] learning and discernment. The Index appears full, and i[illegible] all respects the book is one of merit.

*London Public Health Administration.* By W. McC[illegible]ANKLYN. London: Longmans, Green & Co. 1913.- This is [illegible] handy little book which presents in a lucid form "a conspe[illegible]us of London Public Health Administration."

**Fourth Edition.** *The Criminal Law [illegible]mendment Act 1885.* By F. MEAD and A. H. BODKIN. Lon[illegible]n: Butterworth & Co. 1913.—A new edition of this well-kno[illegible]n work has been necessitated by the passing of the Crimin[illegible] Law Amendment Act 1912 (2 & 3 Geo. V. c. 20), common[illegible] known as the "White Slave

Traffic Bill." Within its scope is included all statutes or parts of statutes relating to indecent offences against women and children. Mr. Mead is the London Police Magistrate, and Mr. Bodkin is one of the Treasury Counsel, so that their qualifications for dealing with this question are undoubted. Under sect. 5 of the Punishment of Incest Act 1908 (8 Edw. VII, c. 45), all proceedings under that Act are to be held *in camerâ*. Formerly, it had been decided that publication of proceedings *in camerâ* could be punished as a contempt of court (*Scott* v. *Scott*, L.R. [1912], P. 4). Upon appeal to the House of Lords, the decision was over-ruled (*The Times*, May 6th, 1913). The present edition will form an invaluable addition to a lawyer's library of Criminal law.

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**Fourth Edition.** *The Students' Guide to the Principles of Equity.* By CHARLES THWAITES. London: Geo. Barber. 1913. —This little work, together with the one on *Constitutional Law and Legal History* which we review elsewhere, form two of a series of Guides for those who wish to pass the Bar Final. A suggested course of reading comes first, and in the second part we have test questions on Indermaur & Thwaites' *Manual of Equity*. The third and most important division is a digest of questions and answers upon eleven branches of Equity. The questions cover a wide range, and the answers are concise, comprehensive, and illuminating. We have no doubt whatever that this little guide will fully effect the purpose for which it is intended.

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Books received, reviews of which have been held over owing to want of space: Lo..nogh's *Land Acquisition and Compensation in British India*; Macmorran's *Shir.. Government 1912–13*, Niemeyer and Strupp's *Jahrbuch des Volkerrechts*; *Estates* *Leading Cases in the Common Law*, Burgin's *Administration of Foreign Contracts* Thwaites' *Constitutional Law*; McMurdy's *The Upas Tree*, *Pease on Phrases*; G.. Carswell's *Law of Domestic Servants*, Cotterell's *Latin Maxims and Law of Mort..* Browne and Jordan's *Handbook of Joint Stock Companies*, Strahan's *tice 1914*; de .. ; Haldane's *Higher Nationality*, *Yearly Supreme Court Prac- and Bribery*; *Gr..* ..er's *Commercial Code of Japan*, Crew's *Secret Commissions Annual Practice 19..* *Jurists of the World*, Trotter's *Law of Contract in Scotland*; *Equity*; Lamb's *Fo..* ; *A.B.C. Guide to Practice*; Kelke's *Leading Cases in* *Years at the Old Bailey*.

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Other Publications receive..—*The Hindustan Review*; Ilbert's *The Coronation Durbar and its Consequences* (Clarendon Press, Oxford); *Calendar of the London School of Economics 1913–14*; *Everyone's Own Physician* (E. Roberts & Co.); del Vecchio's *Il Concetto del Di..o*, *La Ciencia del Derecho Universal Comparado*, and *De la Guerra y la Paz*; Salomon's *The Contest against Criminality* (Norstedt & Sonn, Stockholm); *Revista Generale de Legislacion y Jurisprudencia* (Madrid); *Cambridge Pocket Diary* and *Diary for the Academical Year* (Cambridge University Press).